Jurisdictional Statement

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No.

In the Supreme Court of the United States

October Term, 1981

WALTER W. COHEN, CONSUMER ADVOCATE OF PENNSYLVANIA et al.,
Appellants

v.

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA et al.,
Appellees

On Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Supreme Court of Pennsylvania has promulgated and, in the judgment from which this appeal is taken, affirmed the constitutional validity of, a rule of disciplinary procedure, applicable to all attorneys licensed to practice law in Pennsylvania, which prohibits attorneys from publicly commenting upon a pending administrative proceeding with which they are associated when such comments are deemed to be "reasonably likely to interfere with a fair hearing." This is despite the fact that this rule (or rules substantially identical to this rule) has been declared unconstitutional by United States Circuit Courts in two different circuits and by the Court of Appeals of New York.*

The question presented by this appeal is:

> Does a rule of disciplinary procedure prohibiting public comment by an attorney concerning a pending administrative proceeding with which he is associated, when such comment is deemed to be "reasonably likely to interfere with a fair hearing," violate the first amendment of the United States Constitution by restricting speech to an extent greater than is necessary to assure a fair administrative proceeding and by failing to specify with sufficient clarity areas of prohibited comment?

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* *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. den.*, 427 U.S. 912 (1976) (holding unconstitutional the identical rule as it applies to civil proceedings); *Markfield v. Association of the Bar of the City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82, *appeal dismissed*, 37 N.Y.2d 794, 375 N.Y.S.2d 106 (1975) (holding unconstitutional the rule as applied to criminal proceedings).

LIST OF ALL PARTIES

Appellants are Walter W. Cohen, Esq., Consumer Advocate of Pennsylvania, Daniel Clearfield, Esq., David M. Barasch, Esq., Craig R. Burgraff, Esq., and Martha W. Bush, Esq., Assistant Consumer Advocates, in their official capacities. The appellees are the Disciplinary Board of the Supreme Court of Pennsylvania and Dennis C. Harrington, Chairman, Herbert J. Johnson, Jr., Vice-Chairman, Raymond Pearlstine, Pasco L. Schiavo, Frank J. McDonnell, Mary Bell Hammerman, Robert C. Daniels, Sidney L. Krawitz, John M. Elliott, Nancy M. Neuman and Winfield Keck, Members, individually and in their official capacities.*

In addition to the above-named parties, the American Civil Liberties Union Foundation of Pennsylvania, Inc., filed a brief with the Pennsylvania Supreme Court as *amicus curiae,* urging the court to reverse the decision and order of the Commonwealth Court of Pennsylvania.

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* The above-named appellants and appellees are the current Consumer Advocate and Assistant Consumer Advocates and the current members of the Disciplinary Board of the Supreme Court of Pennsylvania. Pursuant to U.S. Sup. Ct. Rule 48.3, 28 U.S.C., and Pa. R. App. P. 502(c), these names have been substituted as parties for their predecessors who were originally named as parties in the courts below.

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CITATION TO OPINIONS BELOW

The final judgment and opinion of the Pennsylvania Supreme Court entered June 8, 1981 has not yet been reported. The final judgment and opinion are set forth in the accompanying Appendix at 1a and 16a.

The order and opinion of the Commonwealth Court of Pennsylvania, set forth in the Appendix at 2a, are reported at 54 Pa. Commonwealth Ct. 124, 420 A.2d 41 (1980).

STATEMENT OF JURISDICTION

This appeal is from a final judgment of the Supreme Court of Pennsylvania holding valid a disciplinary rule, promulgated by that court pursuant to Pa. Const. art. 5, §10 and 42 Pa. Con. Stat. §1722, against assertions of the rule's repugnancy to the United States Constitution.

The judgment of the Supreme Court of Pennsylvania was entered on June 8, 1981. Notice of appeal was filed on August 21, 1981 in that same court and in the Commonwealth Court of Pennsylvania, the possessor of the record.

Appellate jurisdiction of this matter is conferred upon the United States Supreme Court by 28 U.S.C. §1257 (2), which provides for appeals of state supreme court decisions "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." This Court has heard appeals challenging state supreme court decisions upholding disciplinary rules in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Disciplinary rules are included within the meaning of the term "statute" for the purposes of §1257(2) because, as set forth by this Court in *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1979),

> [d]isciplinary rules are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice law in Vir-

> ginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature.

Id., quoting, Consumers Union of United States, Inc. v. American Bar Association, 470 F. Supp. 1055, 1064 (E.D. Vir. 1979) (Warriner, J., dissenting).

Inclusion of disciplinary rules within the phrase "a statute of any state" is consistent with this Court's broad definition of that term in other contexts. *See, e.g., Williams v. Bruffy,* 96 U.S. 176, 183 (1877) ("Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State. . . ."); *King Mfg. Co. v. Augusta,* 277 U.S. 100, 110 (1928) ("The construction which was put on the phrase 'a statute of any state' in the jurisdictional provision . . . by Williams v. Bruffy . . . did not stop . . . but has been approvingly followed and applied in later cases."); *Lathrop v. Donohue,* 367 U.S. 820, 824 (1961).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

Pennsylvania Disciplinary Rule 7-107, one part of the Code of Professional Responsibility adopted by the Pennsylvania Supreme Court on February 27, 1974 (456 Pa. lvii) and applicable to all lawyers licensed to practice in Pennsylvania, is set forth in its entirety in the appendix to this Jurisdictional Statement. The provision of DR 7-107 challenged by this appeal, DR 7-107(H), states as follows:

> During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
>
> (1) Evidence regarding the occurrence or transaction involved.
>
> (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
>
> (3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
>
> (4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
>
> (5) Any other matter reasonably likely to interfere with a fair hearing.

STATEMENT OF THE CASE

History of Proceedings

This case began on April 24, 1979 when the former Consumer Advocate of Pennsylvania,* Mark P. Widoff, Esquire, filed a petition for declaratory judgment in the Commonwealth Court of Pennsylvania. The petition requested that the court declare Pennsylvania Disciplinary Rule 7-107(H) violative of the first amendment of the United States Constitution (made applicable to the states by the fourteenth amendment of the United States Constitution) and of article 1, section 7 of the Pennsylvania Constitution, both on its face and as applied to the facts which gave rise to the action.

Widoff filed the request for declaratory judgment after a complaint had been filed against him with the Disciplinary Board of the Supreme Court of Pennsylvania

* The Office of Consumer Advocate was established within the Pennsylvania Department of Justice (now the Pennsylvania Office of Attorney General) by Act of July 9, 1976 (P.L. 903, No. 161), Pa. Stat. Ann. tit. 71, §§309-1 *et seq.* (Purdon, Supp. 1980). The Consumer Advocate is empowered and required to represent the interests of consumers of public utility services before the Pennsylvania Public Utility Commission (PUC) or before any other court or agency in connection with matters involving regulation by the PUC. Pa. Stat. Ann. tit. 71, §309-4(a) (Purdon, Supp. 1980). Further, the Consumer Advocate is authorized to initiate actions, when necessary, in his own name. *Id.*

in May, 1978, alleging that certain public statements he had made in his capacity as Consumer Advocate of Pennsylvania concerning pending rate case proceedings before the Pennsylvania Public Utility Commission violated the provisions of Pennsylvania DR7-107 (H).

The first statement complained of was a press release dated April 7, 1978 which announced the filing of certain prepared direct testimony of a witness for the Consumer Advocate in a public utility rate proceeding pending before the PUC and made certain comments concerning the testimony and the effect that such evidence had, in Mr. Widoff's opinion, on the merits of the proceeding. A complaint was also lodged with the Disciplinary Board as a result of a second press release dated April 26, 1978 which announced the Consumer Advocate's filing of a complaint with the Securities and Exchange Commission seeking an investigation of the actions of two national securities rating agencies in connection with the downgrading of Philadelphia Electric Company's commercial paper. Finally, the complaint also alleged a violation of DR7-107 (H) as a result of certain public statements made by Mr. Widoff which criticized an initial decision of a PUC Administrative Law Judge in a PUC rate proceeding involving Metropolitan Edison Company.

After investigating these complaints, the Disciplinary Board, through its counsel, notified the Consumer Advocate by letter that it had dismissed the disciplinary complaints against him because of certain mitigating circumstances, but had found that Disciplinary Rule 7-107 (H) applied to statements made by the Consumer Advocate and that the statements complained of were, in the opinion of the Board, violative of the rule. The letter also made

clear that the Disciplinary Board would issue disciplinary charges against the Consumer Advocate if he continued to make such statements. In light of this continued threat of disciplinary action against the Consumer Advocate and all Assistant Consumer Advocates, they filed the above-referenced petition for declaratory judgment with the Commonwealth Court of Pennsylvania.

On April 2, 1980 the Commonwealth Court, with one judge dissenting, issued an order and opinion which denied the Consumer Advocate's request for a declaration that Disciplinary Rule 7-107(H) was violative of the first amendment of the United States Constitution.* The Consumer Advocate thereupon filed a notice of appeal with the Supreme Court of Pennsylvania. Briefs were submitted and oral argument was heard before that court and, by judgment and opinion entered June 8, 1981, the Supreme Court affirmed the order of the Commonwealth Court of Pennsylvania *per curiam*, without discussion.

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* It made no separate analysis of the claim that the rule was violative of the Pennsylvania Constitution.

History of the Rule in Question

The rule in question, Pennsylvania Disciplinary Rule 7-107(H), is a subsection of a rule which generally proscribes most attorney comment concerning pending legal proceedings when the attorney is "associated" with such proceedings. The full text of the rule, set out in the appendix to this Jurisdictional Statement at 19a, was adopted verbatim by the Pennsylvania Supreme Court from the Model Rules of Professional Conduct issued by the American Bar Association. 456 Pa. 1 vii (Feb. 27, 1974). This section of the Code was inspired by this Court's decision in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), which reversed a criminal conviction because the defendant's right to a fair trial had been denied as a result of considerable prejudicial publicity. *See, ABA Standards Relating To Fair Trial and Free Press,* 80-97 (1968); *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue,* 45 F.R.D. 391 (1968); Reardon, *The Fair Trial-Free Press Standards,* 54 A.B.A.J. 343 (1968). While the *Sheppard* case was a criminal jury trial, the model rule drafted by the ABA applied to criminal investigations, criminal trials (both jury and bench), civil trials and administrative, juvenile and professional disciplinary proceedings. Some version of the model rule has been adopted in all but two states,*

* Only Georgia and California have not adopted some version of DR7-107 as a disciplinary rule. ABA National Center for Professional Responsibility, *Code of Professional Responsibility by State* 828L-849L (1980). While California's Rules of Professional Conduct apparently do not address the issue of attorney comment, *See* Cal. Bus. & Prof. Code §6076 (West), Rule 1-100

and most of those have adopted it as it was proposed by the ABA, including the portion of the rule applicable to administrative proceedings.**

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et seq., Georgia has incorporated DR7-107 as one of that State's "Directory Rules," which operate as a "general guide" for attorneys. See, Ga. Code Ann., tit. 9 Appen., Part III, Code of Professional Responsibility Preamble and DR7-107(H).

** The District of Columbia has eliminated DR7-107(H) in favor of old Canon 20 of the Canons of Professional Ethics. Louisiana permits each individual administrative agency to establish its own rules regarding attorney comment and Maine has limited the rule to criminal and civil matters only. In those cases, the rule prohibits comments "which pose a substantial danger of interference with the administration of justice." ABA National Center for Professional Responsibility, *Code of Professional Responsibility by State* 828L-849L (1980).

THE QUESTION IS SUBSTANTIAL

For the following reasons, this appeal presents a substantial federal question involving the first and fourteenth amendments of the United States Constitution which merits plenary review. Appellants respectfully request this Court to note jurisdiction and permit the filing of briefs and the presentation of oral argument on the substantial question presented.

I. The Judgment and Opinion of the Pennsylvania Supreme Court Is in Conflict With Decisions of Two United States Circuit Courts and With at Least One Other State Court

The Pennsylvania Supreme Court's decision affirming the constitutional validity of Pennsylvania Disciplinary Rule 7-107(H) is contrary to at least two United States Circuit Court decisions.

In *Hirschkop v. Snead,* 594 F.2d 356 (4th Cir. 1979), the Fourth Circuit Court of Appeals held that the "reasonable likelihood of interference" standard used in the rule restricted more comment than was necessary to protect the fairness of civil, administrative and non-jury criminal proceedings and, therefore, found that the rule, as applied to those proceedings, violated the first amendment of the United States Constitution. It suggested further that there was no justification for any pre-existing restriction on comment in such proceedings. The court stated that the record contained no evidence to show that restrictions on

lawyers' speech were necessary to ensure the fairness of such proceedings. 594 F.2d at 373.

The Seventh Circuit Court of Appeals in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. den.*, 427 U.S. 912 (1976), found that the "reasonable likelihood of interference" standard used in the rule made it unconstitutionally overbroad. It adopted instead the narrower "serious and imminent threat of interference" test.* *Accord, Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970).

Finally, in *Markfield v. Association of the Bar of the City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82; *appeal dismissed*, 37 N.Y.2d 794, 375 N.Y.S.2d 106 (1975), the New York Appellate Division likewise found the portion of the rule applicable to criminal proceedings unconstitutional, holding that the "reasonable likelihood of interference" standard was overly broad and that the rule could survive constitutional muster only if it utilized a "clear and present danger test." 49 A.D.2d at 517, 370 N.Y.S.2d at 85.**

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* Because the plaintiffs challenged the version of 7-107 which was contained in the local court rules for that district, the court in *Chicago Council* was not presented with the constitutionality of the rule in the context of administrative proceedings.

** *See, Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036 (D. R.I., 1980) (rejecting the "reasonable likelihood" standard contained in DR 7-107(G), the portion of the rule applicable to civil trials.)

The ABA Standing Committee on Standards for Criminal Justice has also rejected the "reasonable likelihood of interference" test as "too relaxed to provide full protection to the first amendment interests of attorneys." ABA Standards Relating to the Administration of Criminal Justice *"Fair Trial and Free press"* Chap. 8 at 3 (Second Ed. Tentative Draft, Summer, 1978).

II. Pennsylvania Disciplinary Rule 7-107(H) Is Violative of the First Amendment to the United States Constitution on Its Face and as Applied Because the Prohibition of Attorney Comment Concerning Pending Administrative Proceedings Which Are Deemed To Be "Reasonably Likely To Interfere With a Fair Hearing" Restricts Speech to an Extent Greater Than Is Necessary To Assure a Fair Hearing and Fails To Specify With Sufficient Clarity Areas of Prohibited Comment

This appeal presents the opportunity for this Court to clarify the acceptable constitutional parameters of court and bar rules, currently in effect in almost every state of

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The Committee adopted, instead, the "clear and present danger" standard. *Id.*

Further, the Judicial Conference of the United States recently recommended that federal courts eliminate court rules which impose restrictions upon attorney comment concerning pending civil litigation, "leaving that area to be handled by special order in any case where warranted." *Revised Report of the Judicial Conference Committee on the Operation of the Jury on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519, 524 (1980).

Finally, the American Bar Association's Commission on Evaluation of Professional Standards has also recommended that the "reasonable likelihood of interference" standard be removed from codes of professional responsibility. It has proposed a rule which would permit punishment of a lawyer's public comments concerning a pending proceeding only if the speech constitutes a "statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding." ABA Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct*, Proposed Final Draft, Rule 3.6; Alternative Draft, Rule 7-106 (May 30, 1981). The notes to the proposed rules states that,

the union,* which restrict lawyer comment concerning pending administrative proceedings. Plenary review of this appeal is particularly appropriate because it not only presents a substantial federal question involving the first and fourteenth amendments of the United States Constitution, but it also permits a review of a rule of disciplinary procedure which was promulgated in an attempt to respond to the concerns expressed by this Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), regarding the adverse effects of trial publicity on a criminal defendant's fair trial rights. Further, courts, including the Pennsylvania courts below, have upheld the validity of DR7-107 against constitutional attack on the basis of their interpretations of language contained in the *Sheppard* decision. This appeal enables this Court to rule on whether or not these interpretations are constitutionally valid. The opinion and order which is the subject of this appeal provides compelling evidence of the need for guidance from this Court on these issues.

The Pennsylvania Supreme Court, in affirming the opinion and order of the Pennsylvania Commonwealth Court, affirmed the Commonwealth Court's determination that DR7-107(H)'s prohibition of attorney comment which is deemed to be "reasonably likely to interfere with a fair hearing" did not limit comment to an extent greater than is necessary to assure a fair administrative hearing. It found that the prohibition is constitutionally permissible because the proscription applies only to lawyers associated with a proceeding and is limited to the pendency of the

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"[t]he formulation in this Rule incorporates a standard approximating clear and present danger. . . ." *Id.*, Proposed Final Draft at 145, Alternative Draft at 275.

* See discussion at page 9, *supra*.

proceeding. *Widoff v. The Disciplinary Board of the Supreme Court of Pennsylvania,* 54 Pa. Commonwealth Ct. 124, 132, 420 A.2d 41, 45 (1980). Further, it cited this Court's decision in *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966), as support for its conclusion that the government's interest in assuring a fair hearing justifies court rules and regulations which prohibit attorney comment which poses even a likelihood of prejudice to a fair trial. *Widoff v. Disciplinary Board of Supreme Court of Pa.,* 54 Pa. Commonwealth Ct. at 133, 420 A.2d at 45.

The Commonwealth Court's decision is based upon a misreading of this Court's opinion in *Sheppard* as well as other decisions which establish that punishing individuals, including members of the Bar, for speech which poses merely a "reasonable likelihood of interference with a fair hearing" is violative of the first amendment to the United States Constitution.

A rule restricting comments by lawyers concerning pending administrative proceedings limits their ability to convey to the public information concerning the nature and progress of the proceedings as well as their views on issues which arise during the litigation. *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 258 (7th Cir. 1975), *cert. den.,* 427 U.S. 912 (1976); *Hirschkop v. Snead,* 594 F.2d 356, 373 (4th Cir. 1979). Such comments relating to the functioning of the government and the judicial system have been described as being "the major purpose" of the first amendment. *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 838 (1978), *quoting, Mills v. Alabama,* 384 U.S. 214, 218-219 (1966). Further, such a rule also restricts the correlative right of the public to receive information about such events. *Richmond Newspapers, Inc. v. Commonwealth of Virginia,* 448 U.S. 555,

576 (1980); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

Governmental restrictions on the exercise of free speech, particularly when society has such an important interest in receiving such speech, are constitutionally permissible only if they further a substantial governmental interest unrelated to the suppression of free expression and if they prohibit speech to an extent no greater than necessary to protect the governmental interest involved. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

A state has a legitimate interest in insuring the fairness of an administrative hearing. However, restricting all speech which is deemed to be "reasonably likely to interfere with a fair hearing" improperly subordinates the first amendment rights of attorneys to speak and the public to receive information in an overly restrictive effort to avoid, "[t]he type of 'danger' [which] is precisely one of the types of activities envisioned by the Founders in presenting the First Amendment for ratification." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978), *quoting, Wood v. Georgia*, 370 U.S. 375, 388 (1962). Such a standard permits punishment for speech which creates no *actual* prejudice to a proceeding or even the imminent threat of such interference. Rather, an attorney can be disciplined for statements which do no more than prompt a state disciplinary board or supreme court to believe that such comments *could have* posed a threat of interference to the hearing, or that they create an *appearance* of unfairness.* Such a sweeping restriction goes

* Although the protection of the fairness of an administrative proceeding qualifies as a governmental interest sufficient to justify narrowly drawn restrictions on first amendment rights,

well beyond that which is "reasonable or essential" to prevent prejudice to an administrative hearing and does not reflect the " '[p]recision of regulation [which] must be the touchstone in areas so closely touching our most precious freedoms.' " *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976).

The unnecessarily sweeping nature of the rule must be contrasted with the variety of alternatives available to a legal tribunal, particularly an administrative agency, to protect the fairness of the proceeding. Continuances, changes in the location of the hearings and protective orders tailored narrowly to meet the specific dangers associated with each case, are alternatives to a standing disciplinary rule which can serve to insure the fairness of the proceeding.*

This Court has, in recent years, consistently invalidated similar broad restrictions on speech in favor of a requirement that before speech can be punished it must constitute a "clear and present danger to the administra-

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the protection of the appearance of fairness is an insufficient justification for restraints upon free speech rights. A state cannot enact restrictions upon speech merely to enhance the public image of the judicial system or of government. As this Court has stated, "neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the *institutional integrity of its courts* is sufficient to justify the subsequent punishment of speech. . . ." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (emphasis supplied). *Accord, Bridges v. California*, 314 U.S. 252, 270-271 (1941); *Craig v. Harney*, 331 U.S. 367, 376 (1947).

* Recent decisions of this Court have, in fact, required, as justification for the judicial restriction of first amendment rights in specific cases, an express determination that the use of less restrictive devices is inadequate to protect the parties' rights to

tion of justice." In *Bridges v. California,** 314 U.S 252 (1941); *Pennekamp v. Florida,* 328 U.S. 331 (1946); and *Wood v. Georgia,* 370 U.S. 375 (1962), this Court established the "clear and present danger" standard as the basis for the issuance of contempt judgments for out-of-court remarks which pose a threat to the fairness of judicial proceedings.

This Court has also required a showing of a "clear and present danger" to the administration of justice when penalties have been imposed based upon statutes restricting the dissemination of information concerning judicial disciplinary proceedings, *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978), and proceedings involving juvenile offenders. *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979).

The "clear and present danger" test has also been employed to judge the constitutional propriety of court-ordered speech restraints imposed in particular cases. *See,*

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a fair trial. *Richmond Newspapers, Inc. v. Commonwealth of Virginia,* 448 U.S. at 581 (1980); *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 569 (1976). Thus, the statement made by the Commonwealth Court that "[c]ourts cannot be expected to devise *ad hoc* rules for each case," (54 Pa. Commw. Ct. at 133-34, 420 A.2d at 45) fails to recognize the priority which the Constitution ascribes to first amendment rights and is clearly contrary to the above-cited holdings. The potential difficulty of devising *ad hoc* rules for each particular proceeding cannot be used to justify an unnecessarily broad restriction on first amendment rights.

* In *Bridges,* this Court specifically rejected the propriety of prohibiting comment with an "inherent" or "reasonable tendency" to interfere with the fairness of a judicial proceeding. *Bridges v. California,* 314 U.S. at 272-73.

Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976);* *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980). This Court, therefore, has consistently refused to permit content-based punishment of speech on the ground that it posed merely a "reasonable likelihood of interference with a fair trial."**

Courts which have found the "reasonable likelihood" standard acceptable have done so, in large part, on the basis of their interpretation of this Court's directions in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). *See e.g., Hirschkop v. Snead*, 594 F.2d 356, 370 (4th Cir. 1979). The Commonwealth Court of Pennsylvania, in the opinion affirmed by the Pennsylvania Supreme Court and from which this appeal is taken, cited this Court's *Sheppard* opinion as support for its refusal to invalidate the "reasonable likelihood of interference" standard embodied in

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* *Accord, Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980), *affirmed on other grounds*, 101 S.Ct. 2193 (1981); *Zarate v. Younglove*, 86 F.R.D. 80 (Cent. Dist. Cal. 1980); *C.B.S., Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975).

** The fact that such speech is made by an individual who is an attorney participating in a legal proceeding does not curtail or limit that individual's first amendment rights. Courts have made clear that attorneys do not receive a diminished version of constitutional protections as a result of their acceptance of a license to practice law. *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415, 439 (1963); *In re Halkin*, 598 F.2d 176, 186 (D.C. Cir. 1979); *Polk v. State Bar of Texas*, 374 F. Supp. 784, 787 (N.D. Tex. 1974). Nor does their participation in a legal proceeding justify a special restraint. *See, Wood v. Georgia*, 370 U.S. 375 (1962) (invalidating a contempt citation issued against a sheriff because of certain out-of-court statements he made criticizing a pending grand jury proceeding with which he was involved); *In re Halkin*, 598 F.2d 176, 186 (D.C. Cir. 1979).

DR7-107(H). It is respectfully submitted that it is incorrect to rely upon *Sheppard* for support of the "reasonable likelihood" standard for punishing attorney comment concerning pending administrative proceedings. In *Sheppard*, this Court stated in pertinent part as follows:

> [W]here there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (emphasis supplied).

Thus, this Court approved such steps as continuances or changes of venue of a trial when pre-trial news coverage or publicity was reasonably likely to interfere with the fairness of the proceeding, *and* it sanctioned the establishment of judicially-made rules designed to "protect their processes from prejudicial outside interferences." Courts, including the Pennsylvania courts below, mistakenly have read these two statements as one, and interpreted them as approving a reasonable likelihood of interference standard for the regulation of all conduct which might affect the fairness of a legal proceeding, without regard to the constitutional protection afforded such conduct. This interpretation appears to assume that a court's power to limit the impact of trial-related comments is coextensive with

its ability to punish individuals for making such comments. This is a false syllogism.

Unlike the regulation of speech, continuances and changes of venue do not generally affect constitutional rights of individuals other than possibly the defendant in a criminal trial, nor do they exclude the press from attendance at a trial, or affect the manner in which the press reports trial events. *See, Hirschkop v. Snead,* 594 F.2d 356, 380 (4th Cir. 1979) (Winter and Butzner, J.J., concurring in part and dissenting in part). Of course, in an administrative context the court or agency's ability to minimize the potential harm caused by trial publicity is considerably greater than in the context of a criminal jury trial.

Further, as discussed above, when courts have attempted to restrict first amendment rights in order to attempt to insure the fairness of the proceeding, this Court has required the satisfaction of standards much more demanding than the "reasonable likelihood of interference" standard. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Commonwealth of Virginia,* 448 U.S. 555 (1980). Therefore this Court's opinion in *Sheppard* provides no support for the sweeping restriction of speech contained in DR7-107(H).*

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* A further ground for invalidating the rule is that DR7-107(H)(5), that portion of the rule which prohibits comments concerning "any other matter reasonably likely to interfere with a fair hearing," in addition to being overly broad, is fatally vague because it does not define a forbidden area of comment with the precision required of a rule which restricts the exercise of first amendment rights.

This Court has established that a rule restricting speech "must fall [when] 'men of common intelligence must necessarily

CONCLUSION

Based upon the foregoing arguments and authorities, appellants respectfully request that this Court note jurisdiction in this appeal, receive full briefs on the merits and hear oral argument in order to resolve the substantial question presented by this case.

Respectfully submitted,

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guess at its meaning.'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), *quoting, Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Read alone, DR7-107(H)(5) fails to define with any sort of exactitude the limits of the prohibition and thereby provides little guidance to the attorney who, in good faith, seeks to make permissible statements. Other than a quotation from the record, an attorney is forced to remain silent to avoid possible violations of the rule. For this reason, DR7-107(H)(5) has an impermissible chilling effect on the free speech rights of attorneys. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 80-2-322

WALTER W. COHEN, CONSUMER ADVOCATE, ET AL.,

Appellants

v.

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, ET AL.

Appeal from Order of the Commonwealth Court at No. 881 C.D. 1979

Argued: May 20, 1981

OPINION

PER CURIAM: Order affirmed.

Mr. Chief Justice O'Brien and Mr. Justice Wilkinson did not participate in the consideration or decision of this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 881 C.D. 1979

MARK P. WIDOFF, CONSUMER ADVOCATE, et al.
Petitioner

v.

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, et al.,
Respondents

OPINION

Judge Blatt, Filed: October 2, 1980:

The petitioner, the Office of Consumer Advocate, seeks a declaratory judgment that Disciplinary Rule 7-107 (H) of the Pennsylvania Code of Professional Responsibility is unconstitutionally infirm as unduly vague and overbroad.

The Office of Consumer Advocate was legislatively established in 1976 as an arm of the Department of Justice to represent consumers of public utility services in proceedings before the Pennsylvania Public Utility Commission (Commission) and before any other agency or court in regard to any matter which involves regulation by the Commission. Article IX-A of the Administrative

Code, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. §309-1 et seq. The respondent, the Disciplinary Board of the Supreme Court of Pennsylvania (Board), was appointed by the Supreme Court to investigate complaints of unethical conduct by members of the Pennsylvania Bar and to recommend to the Supreme Court that it dismiss the complaint or take appropriate disciplinary action. Pa. R.D.E. 205.

In May of 1978, a complaint was filed with the Board which alleged that Mark P. Widoff, the former Consumer Advocate and a member of the Pennsylvania Bar, had made public statements during the pendency of Commission hearings which violated DR 7-107 (H) of the Pennsylvania Code of Professional Responsibility.[1] The statements complained of included quotes in a newspaper article and two press releases by the Consumer Advocate which concerned pending Commission hearings in which Mr. Widoff was participating in his official capacity.

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[1] The Supreme Court of Pennsylvania pursuant to its authority to supervise the conduct of attorneys as officers of the Court under Article V, Section 10(c) of the Constitution of Pennsylvania, adopted DR 7-107(H) of the Code of Professional Responsibility on February 27, 1974. The Rule provides:

> During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceedings and relates to:
>
> (1) Evidence regarding the occurrence or transaction involved.
>
> (2) The character, credibility, or criminal record of a party, witness or prospective witness.

Ultimately, the Board dismissed the complaint on the grounds that Mr. Widoff had made good faith efforts to comply with the Rule and had believed that he had done so. The Board went on to caution Mr. Widoff, however, that he was nonetheless subject to the restrictions of the Code of Professional Responsibility as an attorney who was also the Consumer Advocate and that disciplinary charges would be brought against him for any future public statements that would be "reasonably likely to interfere with a fair hearing."

We must first resolve whether or not an "actual controversy" exists here in order to justify a declaratory judgment as to the constitutional validity of DR 7-107(H). The Consumer Advocate maintains that the Rule restricts not only his personal right to speak under the first amendment but also the Consumer Advocate's duty to make public statements pursuant to his legislative authority as the representative of public utility customers, and it is asserted that the vagueness and breadth of DR 7-107(H) forces the Consumer Advocate and his assistants either to refrain from constitutionally protected comment or to risk disciplinary action. We realize, of course, that the Declaratory Judgments Act, 42 Pa. C. S. §7531 et seq., is remedial legislation and should be liberally construed and applied. Section 7541 of the Declaratory Judgments Act, 42 Pa. C. S. §7541. Furthermore, "[t]he stated purpose of the

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(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

Declaratory Judgments Act . . . is to settle and afford relief to any person from uncertainty and insecurity with respect to right, status and legal relations affected by a statute." *Snider v. Shapp*, 45 Pa. Commonwealth Ct. 337, 346, 405 A.2d 602, 607 (1979). We believe, therefore, that the Consumer Advocate's dilemma here presents the existence of an actual controversy between the exercise of free speech rights and the threat of disciplinary action. The petitioner has already received warning that past expressions, which the Consumer Advocate considered to be officially required of him, were questionable under the disciplinary rules and that any such statements by him in the future will result in harsh treatment. A liberal construction of the Declaratory Judgments Act allows a resolution of the Consumer Advocate's "uncertainty and insecurity with respect to his rights", and such construction will be given.

As to the petition before us, the petitioner has requested a declaration that the provisions of DR 7-107 (H) are overly broad and unduly vague and, therefore, that his right of free speech is unconstitutionally restricted thereby. It is argued that paragraphs (1)-(4) of DR 7-107 (H) impose limitations on the Consumer Advocate's speech which are greater than necessary to protect the fairness of administrative hearings. It is argued, moreover, that DR 7-107 (H) (5), which generally prohibits statements by attorneys as to "any other matter reasonably likely to interfere with a fair hearing" is not only too restrictive but that it is also unconstitutionally vague. *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1978); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).

First amendment rights such as the right to free speech, of course, are entitled to powerful constitutional protection, but they are not absolute, and they may be limited by governmental action. The government, however, may institute such restraints only if they are meant to further a legitimate public interest unrelated to suppression of expression and if the strictures imposed are no greater than necessary to protect that governmental objective. *Procunier v. Martinez,* 416 U.S. 396 (1974); *Hirschkop v. Snead, supra.*

Initially, therefore, we must identify the nature of the governmental interest in this case and then establish the degree to which first amendment freedoms may legitimately be impinged if at all. In conflict here are the rights of free speech applicable to the Commonwealth through the 14th amendment,[2] and the 14th amendment due process guarantee of a fair trial which applies to all quasi-judicial administrative hearings.[3]

There can be little dispute that the courts of the Commonwealth have not only the right but the obligation to ensure the fairness of their judicial proceedings, and it has been held that in the event of a conflict between the due process clause of the 14th amendment and the first amendment, the right to a fair trial, "the most fundamental of all freedoms," must take precedence. *Hirschkop v. Snead, supra* at 363; *Chicago Council of Lawyers v. Bauer, supra* at 248 (quoting *Estes v. Texas,* 381 U.S. 532, 540 (1965)). Moreover, a fair trial requires that the standards of both procedural and substantive due process

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[2] *See, e.g., Virginia State Board of Pharmacy v. Virginia Consumer Council,* 425 U.S. 748 (1976).

[3] *See, e.g., Withrow v. Larkin,* 421 U.S. 35 (1975).

must be satisfied, and due process is not merely an overall concern with the integrity of the judicial process but a right which is personal to the parties participating in the hearing. The due process rights of the parties to have a fair hearing must then be balanced against the right of free speech retained by attorneys who act as counsel in the same administrative proceedings.

For centuries the fiduciary relationship of an attorney in relation to the judicial process has justified special regulation of his conduct. He is not and cannot be merely a blind advocate for his client; he is an officer of the court with a duty to himself, to the legal community and to the public to promote the integrity of the tribunal in which he is a participant and to avoid conduct that would be likely to prejudice that forum. His function requires him to represent his client in adversarial inquiries in the courtroom and *not* on the streets. He has a status which is particularly subject to special regulation, and, although we agree that an attorney does not forfeit his first amendment rights merely because he is an advocate in a particular legal proceeding, *Wood v. Georgia,* 370 U.S. 375 (1962), we believe that, in the balance, an attorney's personal rights cannot be allowed to supersede the constitutional protection to a fair trial possessed by both his client and by any and all other parties concerned.

Because we believe, therefore, that free speech may be restricted in favor of a fair trial, we must still determine whether DR 7-107(H) limits free expression to a degree that is greater than necessary to assure an impartial tribunal. The petitioner contends that the Rule is overbroad and therefore prohibits comments which would not impair the fairness of an administrative hearing. Addi-

tionally, the petitioner argues that the wording of the Rule is vague and does not place a speaker on notice as to what expressions are prohibited and therefore imposes a chilling effect upon him which inhibits remarks entitled to first amendment protection.

OVERBREADTH

We do not believe that DR 7-107 (H) is overbroad. Our Supreme Court, in the promulgation of the disciplinary rules, has not required that all sources of public information maintain absolute silence in regard to administrative hearings.[4] The proscription here applies only to lawyers and law firms associated with the proceedings and is limited in time to the pendency of the hearing. Nor can we agree with the assertion that the only speech by an attorney which is appropriately restricted is that which creates a "clear and present danger" of prejudice to the fairness of an administrative hearing and that the standard of DR 7-107 (H) (5) proscribing comments which are "reasonably likely to interfere with a fair hearing" is overbroad. *See Chicago Council of Lawyers v. Bauer, supra.* We must, in fact, uphold the "reasonable likelihood" language as appropriately narrow.[5] As indicated earlier, in the event of a conflict between the due process right to a fair trial and freedom of speech, the due process clause must prevail. *Hirschkop v. Snead, supra; Chicago*

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[4] Indeed, such a "gag" on newspapers would be unconstitutional. *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976).

[5] Since we hold that "reasonable likelihood" is the proper language, we will accept for the purposes of this opinion the petitioner's characterization that as between the two standards, "clear and present danger" would allow a greater amount of expression.

Council of Lawyers v. Bauer, supra. Moreover, protection of the right to a fair trial requires more than just the right to appeal a decision allegedly influenced by prejudicial conduct:

> [W]here there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. *The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.* (Emphasis added.)

Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Courts cannot be expected to devise ad hoc rules for each case, and reliance on post-verdict relief would be ineffective. It must fall then to the courts to establish *general* rules to regulate conduct *reasonably likely* to prejudice a fair trial. An attempt to distinguish the "reasonable likelihood" standard of the *Sheppard* case on the basis that the language there was designed to protect the individual rights of a defendant in a criminal trial does not persuade us nor does the argument that free speech rights are entitled to the "broader" protection of the "clear and present danger" test in regard to the administrative proceedings with which we are concerned. We believe that the "reasonable likelihood" language defines the degree of constitutional protection necessary to ensure the fairness of *any* tribunal. Attorneys, therefore, must temper whatever they

say to avoid any statement which would be reasonably likely to prejudice the decision *in the forums concerned.*

It is also argued that the provisions of DR 7-107 (H) (1)-(4) are overbroad in that they specifically prohibit *all* public statements by an attorney involved in an administrative hearing in regard to any matter related to the evidence, the credibility or the character of the witnesses or the attorney's opinion as to the merits. If we were to interpret the wording of paragraphs (1) through (4) to be such as the petitioner proposes, we would be hard-pressed not to agree that the rule is unconstitutionally broad. It seems unlikely to us that *every* public comment by an attorney as to his opinion of the evidence, of the witnesses or of the merits in a pending administrative hearing would be likely to prejudice that proceeding. However, the disciplinary rules have the force of statutes, *American Dredging Co. v. City of Philadelphia,* 480 Pa. 177, 389 A.2d 568 (1978), and the rules of statutory construction require that "[a]n Act of Assembly will not be declared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution." (Emphasis in original.) *Hetherington v. McHale,* 10 Pa. Commonwealth Ct. 501, 513, 311 A.2d 162, 168 (1973) (quoting *Daly v. Hemphill,* 411 Pa. 263, 271, 191 A.2d 835, 840 (1963)). We must presume, therefore, that our Supreme Court did not intend an unconstitutional result and we must look to the entire Rule to determine the extent of its coverage. *Pennsylvania Insurance Department v. Adrid,* 24 Pa. Commonwealth Ct. 270, 355 A.2d 597 (1976). In doing so, we hold that the "reasonable likelihood" standard of paragraph (5) supplements and modifies each of paragraphs (1) through (4). These paragraphs stand as guidelines to indicate the kind of statements which

would normally threaten the fairness of a hearing but such statements are not unqualifiedly prohibited, and whether or not an attorney in a case must remain silent as to any matter delineated in paragraphs (1) through (4) must depend upon whether or not his speech *on that particular issue and in that specific situation* would be reasonably likely to prejudice the tribunal. *See Hirschkop v. Snead, supra.*

VAGUENESS

It is further argued that the general prohibition of DR 7-107 (H) (5) is unconstitutionally vague and that the Rule not only provides insufficient guidance to an attorney who wishes in good faith to make suitable public statements but also promotes arbitrary and discriminatory enforcement of the Rule by the Board. To avoid the infirmity of unconstitutional vagueness a statute or rule must be sufficiently explicit so as to (1) place a reasonable person on notice of the conduct that is proscribed, (2) allow a reasonable person to know what speech is not prohibited and thus avoid an unnecessary chill on constitutional expression and (3) limit the discretion of the agency which is charged with the enforcement of the regulation in order to avoid arbitrary and discriminatory application in specific cases. *Grayned v. City of Rockford,* 408 U.S. 104 (1972). It is necessary to determine, therefore, whether or not the restriction on conduct in this case has been appropriately defined so that it can be understood and applied by "the ordinary person exercising ordinary common sense." *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 579 (1973). We acknowledge that the United States Supreme Court has demonstrated great concern that prohibitions on speech not be allowed to chill

constitutionally protected expression, *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976). We must presume, however, that our own Supreme Court would not have intended such an unenforceable result to occur and we must read DR 7-107(H)(5) in the context of the entire Rule to determine if it is sufficiently specific to avoid unconstitutional vagueness. We recognize, of course, the practical difficulty which exists in drafting a rule general enough to apply to diverse factual situations and yet adequately detailed to fulfill the requirements of the Constitution. Paragraph (5) of the Rule sets out a broad restriction on the speech of an attorney, but that prohibition is tempered when we construe the Rule, as we must in its entirety. *Pennsylvania Insurance Department v. Adrid, supra.* Paragraphs (1) through (4) of the Rule provide examples of matters often likely to interfere with the fairness of a hearing and they act as caveats by which an attorney may measure his own prospective behavior.[6] Furthermore, the Rules in their entirety are preceded by ethical considerations which delineate the policy concerns which the Rules are meant to promote.[7] We do not believe that a rule such as DR 7-107(H)(5)

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[6] The interpretation of paragraphs (1) through (4) as illustrations of conduct likely to be prohibited by (5) is borne out by the actual wording of DR 7-107(H)(5) which refers to "[a]ny *other* matter reasonably likely to interfere with a fair hearing." (Emphasis added.)

[7] EC 7-24, for example, states:

> In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the

can be found unconstitutionally vague if attorneys who are subject to the restrictions therein are guided both by examples of conduct which threaten judicial fairness and by the public policies which underly the Rule.[8] We note also that paragraph (5) relies on a standard of reasonableness and, although we admit that such a standard is difficult to articulate precisely, we believe that it is a pervasive concept throughout the law and is not so uncertain that an ordinary attorney must necessarily guess at its meaning.

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culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

And EC 7-33 provides:

A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

[8] *But see Hirschkop v. Snead, supra.*

The final argument advanced is that the Board unconstitutionally applied the Rule to the facts which underly this case. Again we cannot agree. The Board's letter of November 7, 1978 to Mr. Widoff which both notified him of the dismissal of the complaint against him and cautioned him against any future statements which would violate the Rule, contained no specific findings that his conduct had actually run afoul of DR 7-107(H). Furthermore, even if such a conclusion could be inferred, the Supreme Court has exclusive jurisdiction over appeals related to a Board determination, Sections 722(8) and 725(5) of the Judicial Code, 42 Pa. C. S. §§722(8) and 725(5), and the jurisdiction of the Commonwealth Court over final orders of the Board has been expressly denied, Section 763(c)(1) of the Judicial Code, 42 Pa. C. S. §763-(c)(1).

CONCLUSION

We hold, therefore, that the guidelines of DR 7-107 (H)(1)-(4) and the prohibition of paragraph (5) against statements reasonably likely to interfere with a fair hearing are sufficiently narrow to proscribe only so much speech as must be curtailed to ensure the due process guarantee of a fair hearing. We also hold that DR 7-107 (H)(5), when read in context of the examples of questionable conduct detailed in paragraphs (1) through (4) and the underlying policy concerns of the ethical considerations, is suitably specific to place an ordinary attorney on notice as to what types of expression are likely to prejudice an administrative hearing.

The petitioner's motion for a declaratory judgment, therefore, will be denied.

Judge Williams, Jr. dissents.

ORDER

AND NOW, this 2nd day of October, 1980, the motion for a declaratory judgment by the petitioner, the Office of the Consumer Advocate, is denied.

SUPREME COURT OF PENNSYLVANIA
Middle Office

No. 80-2-322

Walter W. Cohen, Consumer Advocate, et al.,
Appellants

v.

The Disciplinary Board of the Supreme Court of Pennsylvania, et al.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Commonwealth Court of Pennsylvania is affirmed.

(s) Mildred E. Williamson
Deputy Prothonotary

Dated: June 8, 1981

IN THE SUPREME COURT OF THE STATE OF PENNSYLVANIA
Middle District

No. 80-2-322

WALTER W. COHEN, CONSUMER ADVOCATE, et al.,

Appellants

v.

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, et al.,

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Walter W. Cohen, Consumer Advocate, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania entered June 8, 1981, affirming the decision of the Commonwealth Court of Pennsylvania entered October 2, 1980, No. 881, C.D. 1979, upholding the constitutionality of Disciplinary Rule 7-107 (H) of the Pennsylvania Code of Professional Responsibility.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Respectfully submitted,

/s/ Walter W. Cohen
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Consumer Advocate
Daniel Clearfield
Assistant Consumer Advocate
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(717) 783-5048

Dated: August 21, 1981

CERTIFICATE OF SERVICE

I hereby certify that I am, this 21st day of August, 1981, serving either by personal service or by first-class mail, the foregoing document, Notice of Appeal, upon the persons listed below:

Howland W. Abramson, Esq.
Administrative Office of
Pennsylvania Courts
1414 Three Penn Center Plaza
Philadelphia, PA 19102

Allen B. Zerfoss, Esq.
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Harrisburg, PA 17108

(s) Daniel Clearfield
Daniel Clearfield
Assistant Consumer Advocate

DISCIPLINARY RULE 7-107, PENNSYLVANIA CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-107. Trial Publicity

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile

disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

Motion to Dismiss or Affirm

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FILED
DEC 21 1981
ALEXANDER L. STEVAS
CLERK

No. 81-476

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WALTER W. COHEN, CONSUMER ADVOCATE OF PENNSYLVANIA et al.,

Appellants

v.

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA et al.,

Appellees

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS

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Appellees

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS

STATEMENT OF THE CASE

This is an appeal from a final judgment of the Supreme Court of Pennsylvania entered June 8, 1981 affirming the decision of the Commonwealth Court of Pennsylvania entered October 2, 1980 denying appellants' request for a declaration that Pennsylvania Disciplinary Rule 7-107 (H) unconstitutionally restricts appellants' free speech rights in violation of the First

Amendment to the United States Constitution and Article I, §7 of the Pennsylvania Constitution.*

This matter was originally brought to the attention of the Disciplinary Board (Board) by the Philadelphia Electric Company on May 1, 1978 in a Complaint filed against Mark P. Widoff, Esquire, the then Consumer Advocate, (now Walter W. Cohen, Esquire), for his alleged violations of DR 7-107 (H) of the Code of Professional Responsibility. The alleged facts subject to the Board's investigation may be fairly summarized as follows:

On July 1, 1977, the Metropolitan Electric Company (Met-Ed) filed for a base rate increase with the Pennsylvania Public Utility Commission (PUC). In his capacity as Consumer Advocate, appointed under Act of July 9, 1976 (P.L. 903, No. 161), Pa. Stat. Ann. tit. 71 §§309-1 *et seq.*, Mr. Widoff entered the proceedings as counsel of record. On March 10, 1978 an article appeared in the Reading Eagle, a Pennsylvania newspaper, which quoted the Consumer Advocate concerning the recommended decision of two Utility Commission Administrative Law Judges.

The article reported that the Consumer Advocate criticized the Administrative Law Judges as being "totally unreasonable" in their conclusion that the rate re-

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* DR 7-107(H) provides: During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to: (1) Evidence regarding the occurrence or transaction involved. (2) The character, credibility, or criminal record of a party, witness, or prospective witness. (3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such. (4) His opinion as to the merits of the claims, defenses, or positions of an interested person. (5) Any other matter reasonably likely to interfere with a fair hearing.

quest was substantially justified. Reported also was Mr. Widoff's expert witness' analysis of the merits of the request. Saying he would ask the PUC to reject the judges' decision, he accused the latter of completely ignoring certain facts.

On August 5, 1977, Philadelphia Electric Company (PECO) filed for a rate increase with the PUC. Mr. Widoff filed a complaint against the increase as Consumer Advocate. Hearings were commenced before an Administrative Law Judge on October 3, 1977 at which Mr. Widoff served as trial counsel opposing PECO's request. On April 7, 1978, during pending proceedings, Mr. Widoff held a press conference that contained statements sharply criticizing and demeaning the application of PECO. A press release issued on the same day from the Office of the Consumer Advocate reported the testimony just filed by the Advocate with the PUC as "key" and conclusive of "an utter failure of PECO to protect its' customers interests." PECO was accused therein of making "improper adjustments totalling millions of dollars." Mr. Widoff concluded by saying he "hoped" these matters would be considered by the PUC.

On April 26, 1978, Mr. Widoff issued another press release concerning a complaint filed by the Consumer Advocate with the Securities and Exchange Commission. Therein the Consumer Advocate accused Moody's Investor Service and Standard and Poor's Rating-Service of attempting to influence the regulatory process being conducted by the PUC regarding PECO's increase request. Evidence for his belief was set out which was comprised of "information" that individuals from the investment services had contacted the PUC Commissioners and staff threatening downgrading unless PECO was granted an increase in revenues. The regulatory process was characterized as "a cruel joke on the taxpayers who are led to believe these matters are decided on the case record." Widoff said that Moody's action had "the potential of having an enormous psychological im-

pact on the PUC when it considers PECO's overall rate request. . . ."

No disciplinary action was taken by the Disciplinary Board against Mr. Widoff. None are pending against Mr. Cohen.

The appellants thereafter filed a Petition for Declaratory Judgment with the Commonwealth Court of Pennsylvania seeking a declaration that DR 7-107(H) was unconstitutional on its face and as applied to the facts which gave rise to the action. After appellants' Petition was answered, appellants filed a Motion for Judgment on the Pleadings. Oral argument was held before the Commonwealth Court on June 4, 1980. On October 2, 1980 a decision was reached denying appellants' Motion for Judgment on the Pleadings and upholding the constitutionality of DR 7-107(H). Appellants thereafter filed an appeal in the Supreme Court of Pennsylvania which, on June 8, 1981, affirmed the Commonwealth Court without opinion.

ARGUMENT
The Question Is Insubstantial

I. Broad principles of comity permit this court to decline to rule on the constitutionality of the challenged disciplinary rule at this time

The appellee, Disciplinary Board of the Supreme Court of Pennsylvania, respectfully submits that it would be prudent for this Court to decline, as a matter of discretion, to deliver an opinion or enter a judgment detailing its views on the case presented in light of the extensive, prolonged and soon to be completed evaluation and deliberation of the same issue presently being undertaken by highly competent professional committees of judges and lawyers of distinction and experience who participate in the administration of justice across the nation.

In the last week of June, 1981 the Kutak Commission's proposed final draft of the "Model Rules of Professional Conduct" was distributed for the purpose of giving local bar groups, professional organizations, and various American Bar Association sections the opportunity to respond. The Commission also issued an "alternative draft." Before the ABA's House of Delegates meet again in January of 1982, the Commission will meet again to further consider any comments submitted to it, according to Chairman Robert J. Kutak. Mr. Kutak is reported to have stated that, because of many requests for time to review and react, he would urge that no final action be taken by the House of Delegates in January. He is further reported to have expressed the hope that the House would debate the Model Rules so that the Commission could evaluate that discussion in the Spring of 1982. Under this timetable, Mr. Kutak surmised that final action on the Model Rules would be taken at the annual meeting to take place in August of 1982. 50 U.S.L. Week 2141, September 8, 1981.

Rule 3.6 of the proposed final draft of the Model Rules of Professional Conduct and DR 7-106 of the alternative draft, address the issues presented by this appeal and do so in light of the case law advanced as favorable precedent by the appellant. These proposed rules and their accompanying comments and notes may be found in the Appendix.

In pertinent part, the proposed rule provides that:

> A lawyer shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

According to the draftors, the formulation in this rule incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality.

The legal profession in Pennsylvania is presently in the process of reviewing the proposed rules. This effort is evidenced in small part by an announcement and request which appeared in *The Legal Intelligencer* Vol. 185 No. 73, the official newspaper for the publication of all legal notices in Philadelphia County, on October 14, 1981 and read as follows:

> KUTAK COMMISSION COMPLETES PROPOSED FINAL DRAFT: Part II
>
> The Professional Responsibility Committee of the Philadelphia Bar Association has been engaged for more than a year in the review of the Preliminary Draft of the Model Rules of Professional Standards ("Kutak Commission," named after the Committee's Chairperson, Robert J. Kutak, of Omaha, Nebraska).
>
> *The Philadelphia Bar Association,* through its Professional Responsibility Committee, *submitted an 84-page evaluation of the Draft that was ultimately adopted as the position of the Board of Gov-*

ernors of the Philadelphia Bar Association and forwarded to the Kutak Commission.

The Kutak Commission then completed the Proposed Final Draft of the Model Rules, which exhibits both substantive and stylistic changes, on May 30, 1981.

Now, the Professional Responsibility Commission has been charged with the obligation of examining the new Rules and seeks to obtain input from as many members and section (sic) of the Bar as possible.

Published below is the second of three segments of the black letter rules contained in the Draft of the Model Rules. Part Three will be published in tomorrow's issue.

Any comments concerning the Rules should be submitted to the Chairperson of the Professional Responsibility Committee. . . . (Emphasis added)

The appellee surmises that evaluations of this nature are being carried out by the judges and lawyers of the 50 states and perhaps by the federal circuit councils. In effect, a massive quasi-legislative and self-regulatory process is occurring within the legal profession, the results of which, in the final analysis, may or may not be adopted by the Supreme Court of Pennsylvania.

It is the state supreme court which exercises supervisory powers over those admitted to practice before it, pursuant to the Constitution of Pennsylvania, Article V, § 10 (C). The power to discipline, like the power to admit an applicant to membership of the state bar, rests exclusively with that court. *Theard v. United States* 354 U.S. 278, (1957). The nature of the relationship between the court and attorneys admitted to practice before it was summarized by Justice Frankfurter, speaking for a unanimous Court in *Theard:*

The two judicial systems of courts, the state judicatures and the federal judiciary, have autono-

> mous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. " 'Membership in the bar is a privilege burdened with conditions' (*Matter of Rouss*, 221 N.Y. 81, 84, 116 N.W. 782, 783). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-471, 162 N.E. 487, 489, (354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342.) 458 F. 2d at 1208-09.

The appellee Disciplinary Board submits that because of the fiduciary relationship between the appellants and the Pennsylvania judicial system and because of the nationwide deliberative process presently underway concerning the body of rules, including the challenged rule, which govern the officers of the state court systems, it would be an appropriate act of discretion for this Court to abstain from hearing and deciding the allegedly constitutional issue until it has the advantage of the maximum input from the various judicial systems and the profession and until each system has had reasonable opportunity to consider the results of the evaluation.

The appellee advances a broad policy of comity which dictates against intervention with the state judiciary's governing processes over its officers when the specific challenged practices are under close scrutiny. The possibility of a "chilling effect" on First Amendment freedoms should not of itself justify intervention. See *Younger v. Harris*, 91 S. Ct. at 753-754 (1971).

II. The challenged Disciplinary Rule DR 7-107(H) is consistent with law already declared by this court.

Initially, an inquiry must be made concerning the nature of governmental interest which the disciplinary rule DR 7-107(H) serves to advance. The appellant concedes that the state has a legitimate interest in insuring the fairness of an administrative hearing. Indeed appellant would be hardpressed to do otherwise for this Court unanimously stated in the context of administrative adjudications:

> [A] "fair trial is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564 (1973). [*Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975).]

What is the nature of "fair trial" or alternatively, what characterizes it with respect tc the present dispute? Consider the views of this Court:

> We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental freedom of all freedoms—must be maintained at all costs. [*Estes v. Texas*, 381 U.S. 532 (1965).]
>
> * * *
>
> While maximum freedom must be allowed the press in carrying out this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. [*Estes* supra, 381 U.S. 532, 539 (1965).]
>
> * * *
>
> The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside

> influence. . . . [*Patterson v. Colorado*, 205 U.S. 454, 462 (1907).]
>
> * * *
>
> A state may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. [*Cox v. Louisiana*, 379 U.S. 559, 562 (1965).]
>
> * * *
>
> Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. [*Bridges v. California*, 314 U.S. 252, 271 (1941).]
>
> * * *
>
> A trial is not a "free trade in ideas," nor is the best test of truth in the courtroom "the power of the thought to get itself accepted in the competition of the market." [*Bridges* supra, 314 U.S. 252, 283 (Frankfurter, dissenting).]
>
> * * *
>
> The fundamental requirement of due process is the opportunity to be heard. . . . [*Parratt v. Taylor*, ___ U.S. ___, 68 L. Ed. 2d 420, 432, 101 S. Ct. ___ (1981).]

The concept of Due Process is one of "comprehensive generality", *Fay v. New York*, 332 U.S. 259 (1946), rehearing denied 332 U.S. 784, rather than an absolute, and while what constitutes Due Process may be different depending on the circumstances, in its procedural aspect it requires essential fairness in adjudicative proceedings. And however Due Process may vary, its essential and indispensible element of opportunity to be heard must be before a fair and impartial tribunal. *In re Murchison*, 349 U.S. 133, 136 (1955). This jurisprudential principal is not contextual depending upon the nature of the proceedings for its existence and characteristics. It extends in its immutable form to every adjudicative pro-

ceeding be it judicial, administrative or executive. To say otherwise is to concede that there are tolerable levels of impartiality, bias and prejudice which can occur in an adjudicative proceeding. This Court

> in *Sheppard* stated that freedom of discussion must not be allowed to divert the trial from the "very purpose of the court system . . . to adjudicate controversies, *both criminal and civil,* in the calmness and solemnity of the courtroom according to legal procedures." [*Sheppard v. Maxwell,* 384 U.S. 333, 350-51, (1966) quoting *Cox v. Louisiana,* 379 U.S. 559, 583 (1965) (Black, J. dissenting).] (Emphasis added)

It is noteworthy that the proposed final draft of the Model Rules of Professional Conduct (Appendix) advise application of the rule against trial publicity to administrative proceedings.

On several occasions, this Court has realistically noted that judges are human and necessarily susceptible to extraneous influence:

> Judges are human beings also and are subject to the same psychological reactions as laymen.
>
> Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion. [*Estes v. Texas,* 381 U.S. 532, 548-49 (1965).]
>
> . . .
>
> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of trial. [*Cox v. Louisiana,* 379 U.S. 559, 565 (1965).]

. . .

> [J]udges are also human, and we know better then did our forbears how powerful is the pull of the unconscious and how treacherous the rational process. While the ramparts of reason have been found to be more fragile than the Age of Enlightenment had supposed, the means for arousing passion and confusing judgment have been reinforced. And since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print.
>
> . . .
>
> In securing freedom of speech, the Constitution hardly meant to create the right to influence *judges or juries*. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote. [*Pennekamp v. Florida*, 328 U.S. 331, 357, 366 (1946) (Frankfurter, J., concurring).] (Emphasis added)

Like the immutable element of fairness, the human nature of the decision-maker is a given not subject to change depending upon the circumstances.*

The inquiry with respect to substantial state interest does not end at this point.

> [T]o perform its high function in the best way 'justice must satisfy the appearance of justice' *Offut v. United States*, 348 U.S. 11, 14. [*Estes v. Texas*, 381 U.S. 532 (1965), quoting Mr. Justice Black speaking for the Court in *In Re Murchison*, 349 U.S. 133, 75 S. Ct. 628, 99 L. Ed. 942 (1955).]

Judge Phillips, concurring in *Hirschkop v. Snead*, 594 F. 2d 356 (1979), found the state to have an interest independent of the litigants' fair hearing rights in pro-

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*DR 7-107, Impartiality of Tribunal, alternative draft, A3A Model Rules of Professional Conduct, May 30, 1981 (Appendix) acknowledges that lawyers may seek to prey upon frailties of even the otherwise steadfast.

tecting the integrity of certain essential judicial processes that are critical in the adversary system. This interest is apart from any associated with the "dignity" of the process of individual decision-makers, or with "regulation of the profession."

Judge Alfred L. Luongo of the United States District Court for the Eastern District of Pennsylvania recently identified this same interest in *United States v. Flanagan, et al.*, Criminal No. 81-270 (E.D. Pa., Dec. 2, 1981), (Slip Opinion), (Appendix). Judge Luango held that the *very likelihood* that a conflict of interest would arise in the representation of multiple defendants was sufficient to deny defendants their Sixth Amendment right to counsel of their choice. In doing so, Judge Luongo weighed the latter right against the court's responsibility to supervise the professional conduct of attorneys practicing before it. In applying the ABA Standards Relating to Defense Function §3.5, the judge, while recognizing the defendants' right to counsel of their choice, held the right not to be unlimited and that it must yield to *the court's overriding interest in protecting their rights to adequate representation and fair trial, and in preserving the integrity of court procedures*. In his holding he queried, "[M]ust I sit back and wait for a potential conflict to become an actuality?" His answer:

> "[W]here the likelihood is great that a potential conflict may escalate into an actual conflict, and thus threaten to render the entire trial process null and void, I believe it is well within a court's discretion to anticipate the conflict and disqualify defense counsel."

The appellee therefore subscribes to the views of Judge Luongo and of Judge Phillips and would extend the application of the rationale to *every* adjudicative and adversary proceeding, because the harm to be prevented is not related to the type of proceeding, i.e., criminal, civil or administrative, but is rather, related to its nature, i.e., adversarial and judicial or quasi-judicial.

The appellants point to the lawyers' expertise concerning the issues to be resolved in a proceeding as a reason for permitting the lawyer a great deal of freedom of expression in the public interest. Such freedom is a double-edged sword.

In the adversary system that we have, it is a lawyer's job to win using every available and permitted tool and means to do so. If it means publicly politicking and manipulating for a result during a proceeding he will go to the outer limits of permissible behavior. Some attorneys will perhaps maneuver in the greyest of areas. Only disciplinary rules, applicable to each combatant, prevent the extreme.

While it may be arguable that the attorney, in making extrajudicial statements which violate the disciplinary rules as they now stand, may not interfere with the impartiality of the tribunal *in fact*, yet he will do so *de jure*, for the public will assume that just as it may be swayed by news or comment tending to influence it in its judgment of the merits of a dispute, so also may be the deciding tribunal. It is not only the impartiality of the tribunal which may be impaired but also the public's confidence in and respect for the specific tribunal and in the adversary system as a whole.

A trial, or hearing must not be relegated to the status of an existential phenomenon, a reality only to those who experience directly its fairness. We speak of "avoiding the appearance of impropriety" for just this reason.* Those served by our justice systems must not be suspicious that the decision-makers reach conclusions to avoid conflict with attorney-generated public clamor or to avoid being accused of knuckling under. Nor should decision-makers be put in a position of being accused of

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*See DR7-107, Impartiality of Tribunal, Comment, alternative draft, ABA Model Rules of Professional Conduct, May 30, 1981 (Appendix). The proposed rule imposes a duty upon the lawyer to assist the judge in avoiding the appearance of impropriety.

deciding for or against an attorney's position for reasons other than evidence and argument. And attorneys must not be given a free reign to create such impressions by a standard which can only be met if the harm is a certainty and not a reasonable probability. This Court has not supported and should not now support such a policy of risk-taking:

> [O]ur system has always endeavored to . . . prevent even the *probability* of unfairness. . . . *In re Murchison*, supra. [*Estes v. Texas*, supra, 381 U.S. 532, 543 (1965).]
>
> * * *
>
> Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required . . . denies . . . due process of law. *Tumey v. Ohio*, 273 U.S. 510 at 532 (1927). [*Estes v. Texas*, supra, 381 U.S. 532, 543.]
>
> * * *
>
> Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. *Still one cannot put his finger on its specific mischief and prove with particularity* wherein he was prejudiced. [*Estes v. Texas* 381 U.S., supra 532, 544.] (Emphasis added)
>
> * * *
>
> [E]xperience teaches that there are numerous situations in which it might cause actual *unfairness*—some *so subtle as to defy detection* . . . . [*Estes v. Texas* 381 U.S., supra, 381, 544.] (Emphasis added)
>
> * * *
>
> [W]here there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue it until the threat abates, or transfer it to another county not so permeated with publicity. [*Sheppard v. Maxwell*, supra, 384 U.S. 333, 363.] (Emphasis added)

The lesson of *Sheppard v. Maxwell*, supra, is that prophylactic measures are necessary and appropriate and

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. [*Sheppard v. Maxwell*, supra, 384 U.S. 333, 363.]

In a separate opinion, *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), Mr. Justice Brennan stated:

> As officers of the court . . . attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused *or that will obstruct the fair administration of justice*. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see *In re Sawyer*, 360 U.S. 622 (1959), and to impose suitable limitations whose trangression could result in disciplinary proceedings. Cf. *New York Times Co. v. United States*, 403 U.S. at 728-30 (Stewart J., joined by White, J., concurring). (Emphasis added)

The type of adjudicative proceeding may make it more likely or less likely that extrajudicial commentary may obstruct justice, but it is submitted that it can be accomplished.*

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* The ABA proposed Model Rules adopt this philosophy and do not exclude administrative adjudications from protection. (Appendix)

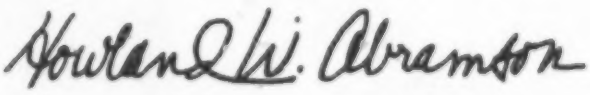
We invite the Court to consider whether the distinction between "clear and present danger" and "reasonable likelihood" is other than appellant's quixiotic effort to create a controversey:

> The phrase "clear and present danger" is merely a justification for curbing utterance where it is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of constitutional dimension. [*Bridges v. California*, supra, 314 U.S. 252, 96 (1941) Frankfurter J. dissenting).]*

CONCLUSION

In conclusion the appellee submits this matter is appropriate for dismissal for reasons of practical comity and insubstantiality.

Respectfully Submitted,



Howland W. Abramson,
Esquire
Charles W. Johns, Esquire
Legal Counsel to the
Administrator of Pa. Courts;
Attorneys for Appellee,
Disciplinary Board of the
Supreme Court of Pa.

December, 1981

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* See also Note, "A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation," 65 *Cornell L. Rev.* 1106 (1980) (arguing that there is no constitutionally significant difference between the "reasonable likelihood" and the "clear and present danger" tests).

Appendix

PROPOSED FINAL DRAFT

Model Rules of Professional Conduct

May 30, 1981

American Bar Association
Commission on Evaluation of Professional Standards

RULE 3.6 *TRIAL PUBLICITY*

(a) A LAWYER SHALL NOT MAKE AN EXTRAJUDICIAL STATEMENT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW WILL HAVE A SUBSTANTIAL LIKELIHOOD OF MATERIALLY PREJUDICING AN ADJUDICATIVE PROCEEDING. AN EXTRAJUDICIAL STATEMENT, OTHER THAN ONE PERMITTED BY PARAGRAPH (b), ORDINARILY IS LIKELY TO HAVE SUCH AN EFFECT WHEN IT REFERS TO A CIVIL MATTER TRIABLE TO A JURY, OR A CRIMINAL MATTER OR PROCEEDING THAT COULD RESULT IN INCARCERATION, AND THE STATEMENT RELATES TO:

(1) THE CHARACTER, CREDIBILITY, REPUTATION OR CRIMINAL RECORD OF A PARTY, SUSPECT IN A CRIMINAL INVESTIGATION OR WITNESS, OR THE IDENTITY OF A WITNESS, OR THE EXPECTED TESTIMONY OF A PARTY OR WITNESS;

(2) IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION, THE POSSIBILITY OF A PLEA OF GUILTY TO THE OFFENSE OR THE EXISTENCE OR CONTENTS OF ANY CONFESSION,

ADMISSION, OR STATEMENT GIVEN BY A DEFENDANT OR SUSPECT OR THAT PERSON'S REFUSAL OR FAILURE TO MAKE A STATEMENT;

(3) THE PERFORMANCE OR RESULTS OF ANY EXAMINATION OR TEST OR THE REFUSAL OR FAILURE OF A PERSON TO SUBMIT TO AN EXAMINATION OR TEST, OR THE IDENTITY OR NATURE OF PHYSICAL EVIDENCE EXPECTED TO BE PRESENTED;

(4) ANY OPINION AS TO THE GUILT OR INNOCENCE OF A DEFENDANT OR SUSPECT IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION; OR

(5) INFORMATION THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS LIKELY TO BE INADMISSIBLE AS EVIDENCE IN A TRIAL AND WOULD IF DISCLOSED CREATE A SUBSTANTIAL RISK OF PREJUDICING AN IMPARTIAL TRIAL.

(b) A LAWYER INVOLVED IN THE INVESTIGATION OR LITIGATION OF A MATTER MAY STATE WITHOUT ELABORATION:

(1) THE GENERAL NATURE OF THE CLAIM OR DEFENSE;

(2) INFORMATION CONTAINED IN A PUBLIC RECORD;

(3) THAT INVESTIGATION OF THE MATTER IS IN PROGRESS, INCLUDING THE GENERAL SCOPE OF THE INVESTIGATION, THE OFFENSE OR CLAIM OR DEFENSE INVOLVED AND, EXCEPT WHEN PROHIBITED BY LAW, THE IDENTITY OF THE PERSONS INVOLVED;

(4) THE SCHEDULING OR RESULT OF ANY STEP IN LITIGATION;

(5) A REQUEST FOR ASSISTANCE IN OBTAINING EVIDENCE AND INFORMATION NECESSARY THERETO;

(6) A WARNING OF DANGER CONCERNING THE BEHAVIOR OF A PERSON INVOLVED, WHEN THERE IS REASON TO BELIEVE THAT SUCH DANGER EXISTS; AND

(7) IN A CRIMINAL CASE:

(i) THE IDENTITY, RESIDENCE, OCCUPATION AND FAMILY STATUS OF THE DEFENDANT OR SUSPECT:

(ii) IF THE DEFENDANT OR SUSPECT HAS NOT BEEN APPREHENDED, INFORMATION NECESSARY TO AID IN APPREHENSION OF THAT PERSON;

(iii) THE FACT, TIME AND PLACE OF ARREST, RESISTANCE, PURSUIT AND USE OF WEAPONS; AND

(iv) THE IDENTITY OF INVESTIGATING AND ARRESTING OFFICERS OR AGENCIES AND THE LENGTH OF THE INVESTIGATION.

COMMENT:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures

aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

NOTES:

Code Comparison

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general criteria of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice. Finally, Rule 3.6 omits DR 7-107(C)(7), which provides that a lawyer may reveal "at the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement." Such revelations may be substantially prejudicial and are frequently the subject of pre-trial suppression motions, which, if successful may be circumvented by prior disclosure to the press.

Legal Background

Current standards governing extrajudicial statements about pending litigation were adopted in response

to Sheppard v. Maxwell, 384 U.S. 333 (1966), which reversed a criminal conviction partly on the basis of highly prejudicial adverse publicity. In *Sheppard* the Court stated that, to preserve a defendant's right to fair trial, a court could proscribe "extrajudicial statements by any lawyer . . . which divulged prejudicial matters, such as the [defendant's] refusal . . . to submit to interrogation or take [potentially incriminating] tests; any statement made by [the defendant] to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." 384 U.S. at 361. The Court did not, however, indicate the extent to which First Amendment rights might restrict such orders. The First Amendment implications were subsequently studied and rules to govern public statements by attorneys in criminal cases suggested by several committees. *See generally* ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE RELATING TO FAIR TRIAL AND FREE PRESS 80-97 (1968); "Report of the Committee on the Operation of the Jury System on the Free Press-Fair Trial Issue," 45 F.R.D. 391, 404-05 (1969) [hereinafter cited as Report: "Free Press-Fair Trial"]. The Code of Professional Responsibility extended the restrictions to civil proceedings, administrative hearings, juvenile proceedings and disciplinary proceedings. DR 7-107(F)-(H).

Two courts have extensively considered challenges to the constitutionality of DR 7-107. *See* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975). A third court reviewed the constitutionality of the Code standards as applied to specific public comment by a lawyer. Markfield v. Association of the Bar, 49 A.D.2d 516, 370 N.Y.S.2d 82, *appeal dismissed*, 37 N.Y.2d 794, 337 N.E.2d 612, 375 N.Y.S.2d 106 (1975). Each court identified constitutional infirmities in the Code standards, although the cases reach different conclusions on several

issues. *See generally* Note, "Restrictions on Attorney's Extrajudicial Comments on Pending Litigation — The Constitutionality of Disciplinary Rule 7-107: *Hirschkop v. Snead*," 41 Ohio St. L.J. 771 (1980).

Categorical or Illustrative Standards

The cases uniformly hold that DR 7-107(A) cannot be applied as a per se rule to statements of the type specified in the rule. A showing is required that the particular statement actually threatened the harm that the standards seek to avert. Hirschkop v. Snead, 594 F.2d 356, 365-68 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975); Markfield v. Association of the Bar, 42 A.D.2d 516, ____, 370 N.Y.S.2d 82, 85, *appeal dismissed*, 37 N.Y.2d 794, 337 N.E.2d 612, 375 N.Y.S.2d 106 (1975). However, the three cases differ with regard to the level of threatened harm that is constitutionally required before discipline can be imposed. *Hirschkop* holds that a "reasonable likelihood" of prejudice to a fair trial is sufficient. 594 F.2d at 365-70. *Bauer* holds that a public statement must present a "serious and imminent threat" to the fair administration of justice. 522 F.2d at 251-52. *Accord*, In re Oliver, 452 F.2d 111, 114-15 (7th Cir. 1971). *Markfield* states that a reasonable likelihood test may be constitutionally sufficient, but holds that discipline should be applied only where it is found that the statements presented a "clear and present danger" to the fair administration of justice. 49 A.D.2d at ____, 370 N.Y.S.2d at 85.

The "reasonably know/substantial likelihood" test is derived from *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966), where the Court stated: "there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat

abates, or transfer it to another county not so permeated with publicity." This test was employed in *Sheppard* to describe remedial measures that do not involve the suppression of speech, such as change of venue, but the difference between remedying and penalizing or suppressing was held to be unimportant in *Hirschkop*. "If remedial action is required on the basis of a reasonable likelihood test, . . . the rules for the avoidance of the harm must be considered under the same test. Implicitly . . . the Supreme Court . . . approved the reasonable likelihood standard for the application of the preventive rules." 594 F.2d at 370. This assumed equivalence between the basis for limiting the consequences of anticipated speech and the basis for punishing speech seems doubtful. The Supreme Court has consistently invoked the "clear and present danger" standard to test the validity of suppressions of speech. The test is employed to review court-ordered prior restraints, *see* Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976), and statutes that provide criminal penalties imposed after the event. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Bridges v. California, 314 U.S. 252 (1941). Although cases often involve restrictions on press activity, *see, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), or the use of summary contempt powers, *see, e.g.*, Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946), the "clear and present danger" test has also been invoked in cases involving statements by officers of the court, *see, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962) (sheriff), and cases involving penalties imposed after plenary proceedings. *E.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). Significantly, no Supreme Court decision has employed a "reasonable likelihood" standard to test the validity of a content-based restriction of free speech. Hirschkop v. Snead, 594 F.2d at 378-79 (Winter, J., and Butzner, J., concurring and dissenting);

see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §12-11 (1979). Different standards applied to false speech have no relevancy in the context of pretrial publicity, where truth or falsity is not at issue. *See* Notes, Rules 7.1 & 8.3. In 1978, the ABA Criminal Justice Project Standards for Fair Trial and Free Press were revised to incorporate "the clear and present danger test." 2 ABA, STANDARDS FOR CRIMINAL JUSTICE §8-1.1(a) & Comment (2d ed. 1978) ("the reasonable likelihood test is too relaxed to provide full protection to the first amendment interest of attorneys"); *see* Hirschkop v. Snead, 594 F.2d at 381 (Winter, J., and Butzner, J., concurring and dissenting).

The formulation in this Rule incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality. *See* Bridges v. California, 314 U.S. 252, 273 (1941) ("neither inherent tendency nor reasonable tendency is enough to justify a restriction of free expression"); Hirschkop v. Snead, 594 F.2d at 378-81 (Winter, J., and Butzner, J., concurring and dissenting). *Compare* Note, "A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation," 65 Cornell L. Rev. 1106 (1980) (arguing that there is no constitutionally significant difference between the "reasonable likelihood" and the "clear and present danger" tests).

Whether a particular statement poses a sufficiently serious and imminent threat to the fair administration of justice depends upon all the surrounding circumstances. An examination of "the particular utterance . . . and the circumstances of [its] publication [is necessary] to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978) (quoting Bridges v. California, 314 U.S. 252, 271 (1941)). *Accord*, Wood v. Georgia, 370 U.S. 375 (1962); Chase v. Robson,

435 F.2d 1059 (7th Cir. 1970). Significant factors in determining the seriousness and imminence of the threat include the timing of the statement, *compare* Sheppard v. Maxwell, 384 U.S. 333 (inadmissible evidence disclosed to press immediately prior to and during trial) *with* Stroble v. California, 343 U.S. 181 (1952) (confession disclosed to press remote in time), and the extent to which the information has been previously circulated, *see* Hirschkop v. Snead, 594 F.2d at 367; *cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (press cannot be restrained from truthfully stating facts from the public record). Additional factors are the nature of the statement, *see* Markfield v. Association of the Bar, 49 A.D.2d at ____, 370 N.Y.S.2d at 85, and the nature of the proceeding and its vulnerability to prejudicial influence. *See* Wood v. Georgia, 370 U.S. at 389 (grand jury investigation and contempt proceeding); In re Oliver, 452 F.2d 111 (7th Cir. 1971) (civil injunctive proceeding). The specific statements described in paragraph (a) illustrate information that ordinarily may, if disseminated, present a serious threat to the fair administration of justice. *Accord,* Chicago Council of Lawyers v. Bauer, 522 F.2d at 251 ("still, we think there is a place and need for specific provisions in properly drawn rules. Lawyers must be aware of exactly what areas of speech might pose a serious and imminent threat of interference with a fair trial."); *see* Hirschkop v. Snead, 594 F.2d at 356.

Application to Criminal Bench Trials and Grand Jury Investigations

The Supreme Court noted a distinction between judicial proceedings involving trial by jury and other proceedings. Wood v. Georgia, 370 U.S. 375 (1962). In other decisions the Court has rejected the proposition that extrajudicial comment is punishable because it might cause a judge to yield to public pressure. Craig v. Harney, 331 US.. 367 (1947); Pennekamp v. Florida,

328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). The *Hirschkop* decision relies on these cases to hold that DR 7-107 cannot be applied to criminal bench trials. 594 F.2d 356, 371-72 (4th Cir. 1979). In contrast, *Bauer* upholds the application of DR 7-107 in cases involving criminal bench trials, 522 F.2d 522 F.2d 242, 255-57 (7th Cir. 1975), relying on Cox v. Louisiana, 379 U.S. 559 (1965) (upholding statute punishing picketing or parading on or near a court house with the intent to interfere with the administration of justice or the intent to influence any judge).

In any event, only in rare circumstances would extrajudicial comment by a lawyer substantially threaten the fairness of a criminal bench trial. The concern expressed in Sheppard v. Maxwell, 384 U.S. 333 (1966), that the fact finder will have access to inadmissible but highly prejudicial information is not often pertinent to a bench trial. Trial courts often review such information when ruling on motions to suppress evidence and in connection with sentencing. Hirschkop v. Snead, 594 F.2d 356; *see* United States v. Tucker, 404 U.S. 443 (1972) (sentencing inquiry is ordinarily unlimited either as to the kind of information or its source); FED R. CRIM. P. 32(c). Additionally, judges are presumed able to withstand public criticism and public pressure. *See* Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946). Significantly, although it has had a number of opportunities to do so, the Supreme Court has not held that public comment concerning a bench trial can never be punished. The decisions rest on the particular facts presented by the record in each case. *See* Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). Accordingly, this Rule can apply to a criminal bench trial as well as to trial by jury. *Accord,* ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE RELATING TO FAIR TRIAL AND FREE PRESS

§ 1.1 (1968). *See generally* Report: "Free Press-Fair Trial;" Note, "A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation," 65 Cornell L. Rev. 1106 (1980).

The application of DR 7-107 to prevent bias in grand jury proceedings has also been challenged. *Bauer* holds that DR 7-107 cannot be applied to defense attorneys during such proceedings. 522 F.2d at 253. *Hirschkop* upholds the application of DR 7-107 to grand jury proceedings as long as there remains a possibility that a jury trial may ensue. 594 F.2d at 371. The Supreme Court has stated that an ongoing grand jury investigation is a matter of public concern and properly a subject of public debate. *See* Wood v. Georgia, 370 U.S. 375 (1962). "Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecutions; it serves the invaluable function in our society of standing between the accuser and the accused. . . . Particularly in matters of local political corruption and investigations it is important that freedom of communication be kept open and that real issues not become obscured to the grand jury." 370 U.S. at 390. *See generally* Note, "The Grand Jury as an Investigatory Body," 74 Harv. L. Rev. 590 (1961). Furthermore, a grand jury is permitted to consider evidence inadmissible at trial, such as illegally seized evidence and an improperly gained confession. *See* United States v. Calandra, 414 U.S. 338 (1974). The *Wood* decision indicates that misconduct aimed at influencing the outcome of a grand jury proceeding and actual interference with the grand jury process may be punished. 370 U.S. at 389, 393.

Rule 3.6 applies to grand jury investigations and to other preindictment proceedings. *See* Sheppard v. Maxwell, 384 U.S. at 333. For similar reasons the Rule is not restricted to prosecutors. *Compare* Chicago Council of Lawyers v. Bauer, 522 F.2d 242; Freedman & Starwood, "Prior Restraints on Freedom of Expression by Defen-

dants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum," 29 Stan. L. Rev. 607 (1977).

Application to Civil Cases

Both *Hirschkop*, 594 F.2d 356, 373 (4th Cir. 1979), and *Bauer*, 522 F.2d 242, 257-59 (7th Cir. 1975), hold that DR 7-107 cannot be applied to civil matters. The basis for these holdings appears to be twofold: first, that civil proceedings may extend over a protracted period of time; and, second, that civil proceedings often involve matters of public concern. Hirschkop v. Snead, 594 F.2d at 373. For these reasons DR 7-107 was held to be overly broad. This view appears to confuse the question of facial validity with that of valid application.

A proceeding's duration may dilute the seriousness and imminence of a threat to the fair administration of justice. *Cf.* Stroble v. California, 343 U.S. 181 (1952). However, even in a protracted proceeding, a disclosure of inadmissible evidence made on the day the jury begins its deliberation could seriously interfere with the fair administration of justice. The timing and nature of the comment, not the length of the proceeding, should determine the propriety of disciplinary measures. With respect to the argument that civil trials often involve matters of public concern, the same can be said of many criminal matters. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Report: "Free Press-Fair Trial." The state interest in safeguarding the integrity of its judicial process would seem to apply to civil as well as criminal matters. *See* Cox v. Louisiana, 379 U.S. 559, 581-84 (1965) (Black, J., dissenting). Accordingly, this Rule does not exclude civil cases, although the nature of the proceeding will affect analysis of the seriousness of the threat to a fair trial. *See* Craig v. Harney, 331 U.S. 367, 378 (1947) ("the rule . . . is fashioned to serve the needs of all litigation, not merely select types of pending cases").

Other Proceedings

Hirschkop held DR 7-107 invalid as applied to disciplinary proceedings and administrative hearings, 594 F.2d 356, 373-74 (4th Cir. 1979). This holding seems overly broad. The standard adopted by paragraph (a) incorporates the nature of the proceeding as a factor in the calculus.

With regard to rules of confidentiality that may validly apply to participants in such proceedings, see Rule 3.4(c). *See generally* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

Applicability

It has been argued that limitations on extrajudicial comment should be applied only to prosecuting attorneys and to plaintiffs' counsel. Freedman & Starwood, "Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum," 29 Stan. L. Rev. 607 (1977). *See also* Chicago Council of Lawyers v. Bauer, 522 F.2d at 253. This argument is based in part on the belief that restrictions on pretrial publicity are intended to protect the Sixth Amendment rights of the defendant and not to preserve the broader state interest in preserving the fair administration of justice. *Id.* There is little in relevant Supreme Court decisions to commend such a point of view. *See* Sheppard v. Maxwell, 384 U.S. at 363. Indeed, in a number of cases the Supreme Court has identified the state's interest as the more general one of protecting the administration of justice, permitting measures necessary to prevent "prejudice [that] might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding." Wood v. Georgia, 370 U.S. 375, 389 (1962). *See* Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946) ("substantive evil" state may prevent is the "disorderly and unfair administration

of justice"); Bridges v. California, 314 U.S. 252 (1941). Accordingly, this Rule draws no distinction between prosecutors or plaintiffs and defendants.

Permissible Statements

Paragraph (b)(1) expands DR 7-107(C) by permitting a lawyer to state the general nature of a claim or defense in a pending proceeding. This expansion seems constitutionally compelled and, to a large degree, obviates the need to confine the restrictions to prosecutors and plaintiffs. *See* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975); Freedman & Starwood, *supra*.

Paragraph (b) eliminates DR 7-107(C)(7) which unqualifiedly permits statements about physical evidence seized at the time of its seizure. Such evidence is frequently subject to pre-trial motions alleging improper warrant, absence of probable cause, and other grounds for suppression. *See generally* W. LAFAVE, SEARCH AND SEIZURE §11.2 (1980). Permitting publicity at the time of seizure can circumvent the effect of suppression by placing in public circulation evidence not admissible at trial. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966). Such publicity is governed by paragraph (a)(5) and is prohibited where it would create a serious threat of substantially prejudicing a fair trial.

ALTERNATIVE DRAFT
Code of Professional Responsibility Format

Model Rules of Professional Conduct

May 30, 1981

American Bar Association
Commission on Evaluation of Professional Standards

DR 7-106 *TRIAL PUBLICITY*

(A) A LAWYER SHALL NOT MAKE AN EXTRAJUDICIAL STATEMENT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW WILL HAVE A SUBSTANTIAL LIKELIHOOD OF MATERIALLY PREJUDICING AN ADJUDICATIVE PROCEEDING. AN EXTRAJUDICIAL STATEMENT, OTHER THAN ONE PERMITTED BY PARAGRAPH (B), ORDINARILY IS LIKELY TO HAVE SUCH AN EFFECT WHEN IT REFERS TO A CIVIL MATTER TRIABLE TO A JURY, OR A CRIMINAL MATTER OR PROCEEDING THAT COULD RESULT IN INCARCERATION, AND THE STATEMENT RELATES TO:

(1) THE CHARACTER, CREDIBILITY, REPUTATION OR CRIMINAL RECORD OF A PARTY, SUSPECT IN A CRIMINAL INVESTIGATION OR WITNESS, OR THE IDENTITY OF A WITNESS, OR THE EXPECTED TESTIMONY OF A PARTY OR WITNESS;

(2) IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION, THE POSSIBILITY OF A PLEA OF GUILTY TO THE OFFENSE, OR THE EXISTENCE OR CONTENTS OF ANY CONFESSION, ADMISSION OR STATEMENT GIVEN BY A DEFENDANT OR SUSPECT OR THAT PERSON'S

REFUSAL OR FAILURE TO MAKE A STATEMENT;

(3) THE PERFORMANCE OR RESULTS OF ANY EXAMINATION OR TEST OR THE REFUSAL OR FAILURE OF A PERSON TO SUBMIT TO AN EXAMINATION OR TEST, OR THE IDENTITY OR NATURE OF PHYSICAL EVIDENCE EXPECTED TO BE PRESENTED;

(4) ANY OPINION AS TO THE GUILT OR INNOCENCE OF A DEFENDANT OR SUSPECT IN A CRIMINAL CASE OR PROCEEDING THAT COULD RESULT IN INCARCERATION;

(5) INFORMATION THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS LIKELY TO BE INADMISSIBLE AS EVIDENCE IN A TRIAL AND WOULD IF DISCLOSED CREATE A SUBSTANTIAL RISK OF PREJUDICING AN IMPARTIAL TRIAL.

(B) A LAWYER INVOLVED IN THE INVESTIGATION OR LITIGATION OF A MATTER MAY STATE WITHOUT ELABORATION:

(1) THE GENERAL NATURE OF THE CLAIM OR DEFENSE;

(2) INFORMATION CONTAINED IN A PUBLIC RECORD;

(3) THAT INVESTIGATION OF THE MATTER IS IN PROGRESS, INCLUDING THE GENERAL SCOPE OF THE INVESTIGATION, THE OFFENSE OR CLAIM OR DEFENSE INVOLVED AND, EXCEPT WHEN PROHIBITED BY LAW, THE IDENTITY OF THE PERSONS INVOLVED;

(4) THE SCHEDULING OR RESULT OF ANY STEP IN LITIGATION;

(5) A REQUEST FOR ASSISTANCE IN OBTAINING EVIDENCE AND INFORMATION NECESSARY THERETO;

(6) A WARNING OF DANGER CONCERNING THE BEHAVIOR OF A PERSON INVOLVED, WHEN THERE IS REASON TO BELIEVE THAT SUCH DANGER EXISTS; AND

(7) IN A CRIMINAL CASE:

(i) THE IDENTITY, RESIDENCE, OCCUPATION AND FAMILY STATUS OF THE DEFENDANT OR SUSPECT;

(ii) IF THE DEFENDANT OR SUSPECT HAS NOT BEEN APPREHENDED, INFORMATION NECESSARY TO AID IN APPREHENSION OF THAT PERSON;

(iii) THE FACT, TIME AND PLACE OF ARREST, RESISTANCE, PURSUIT AND USE OF WEAPONS; AND

(iv) THE IDENTITY OF INVESTIGATING AND ARRESTING OFFICERS OR AGENCIES AND THE LENGTH OF THE INVESTIGATION.

COMMENT:*

Notes:

*The "Comments" and "Notes" of the alternative draft are virtually identical to those of the proposed final draft of the ABA Model Rules of Professional Conduct, May 30, 1981.

* * *

DR 7-107 *IMPARTIALITY OF THE TRIBUNAL*

(A) A LAWYER SHALL NOT:

(1) SEEK TO INFLUENCE A JUDGE, JUROR, PROSPECTIVE JUROR OR OTHER DECISION-MAKER BY MEANS PROHIBITED BY LAW; OR

(2) COMMUNICATE EX PARTE WITH SUCH A PERSON EXCEPT AS PERMITTED BY LAW; OR

(3) ENGAGE IN CONDUCT INTENDED TO DISRUPT A TRIBUNAL.

COMMENT:

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. In addition to specific requirements, that Code requires generally that a judge avoid impropriety or the appearance of impropriety. A lawyer is required to avoid contributing to a violation of such provisions.

* * *

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	
ROBERT FLANAGAN	:	Criminal No. 81-270
JAMES KEWESHAN	:	
SIDNEY LANDIS	:	
THOMAS MCNAMEE	:	

OPINION

LUONGO, J. December 2, 1981

Presently before me is the Government's motion to prohibit the law firm of Sprague and Rubenstone from representing all four defendants in this criminal case. The defendants, Robert Flanagan, James Keweshan, Sidney Landis and Thomas McNamee, all police officers employed by the Philadelphia Police Department, are each charged in a single indictment with conspiracy to violate the civil rights of citizens. 18 U.S.C. §241. The indictment also charges substantive violations of citizens' civil rights, *see* 18 U.S.C. §242, by Flanagan (Counts Two through Thirteen), McNamee (Counts Two through Thirteen), Landis (Counts Four through Thirteen), and Keweshan (Counts Two through Seven, and Eleven through Thirteen).

The defendants are members of a so-called "grandpop" squad, a decoy squad engaged in undercover operations to ferret out street crime. Typically, defendant Flanagan would pose as the decoy, with defendants Keweshan, Landis and McNamee as his backup. After being accosted and robbed by an assailant, Flanagan would signal the backup team by yelling: "Give me

back my money." Keweshan, Landis and McNamee would then close in and make the arrest. The Government charges that over a period of about 17 months the defendants conspired to violate citizens' civil rights by arresting persons, under color of law, without probable cause, and that varying combinations of the defendants did in fact falsely arrest and/or physically abuse eight persons in violation of their civil rights.

Pursuant to the Government's request, and in accordance with Fed.R.Crim.P. 44(c),[1] a hearing was held on November 12, 1981, to inquire whether defendants were aware of (1) the risk of joint representation, and (2) their right to separate representation. Each of the defendants was present at the hearing. Bruce Thall and James Leonard from the firm of Sprague and Rubenstone appeared on behalf of the defendants. At that time, Mr. Thall informed the court that, after extensive discussions with each defendant concerning the risks and pitfalls of joint representation, each still wished to be represented by the firm of Sprague and Rubenstone.

Among the areas which Mr. Thall stated had been discussed with each defendant were the following:

> (1) Opening and closing statements — Unlike separate counsel, joint counsel would not be able to set one defendant apart from another.

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1. Fed.R.Crim.P. 44(c), which became effective December 1, 1980, provides:

> (c) *Joint Representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

(2) Sentencing — In the event that more than one defendant were convicted, joint counsel could not argue that one defendant was more or less culpable than another.

(3) Spillovers — Possibility that jury might infer from joint representation that if one defendant is found guilty, the others must be also.

(4) Possible grants of immunity — Each defendant was told that the Government could offer one of the defendants immunity on the condition that he testify against the others, thus interfering with a joint trial strategy.

(5) Nature of the evidence — It was explained to each defendant that the Government might introduce more evidence tending to implicate defendant Flanagan and that as a result:

(a) the jury might infer that the others were also guilty because of joint representation,

(b) defense efforts might be more concentrated toward the defense of Flanagan.

(6) Right to testify — If one defendant exercised his right to testify on his own behalf and one or more of the others did not, the jury, from the fact of joint representation alone, might infer guilt on the part of those not testifying. Also, on cross-examination, the defendant who exercised his right to testify could be questioned as to his knowledge of activities involving the other defendants.

(7) Character and reputation testimony — Each was informed that if the defense offered character or reputation testimony on behalf of some but not all defendants, the jury might infer from the fact of joint representation that the character or reputation of the other defendants is undesirable.

(8) Right to separate counsel — Each defendant was apprised of his right to separate counsel,

and that, if he could not afford counsel, the court would appoint counsel for him.

After Mr. Thall completed his outline of the areas discussed with the defendants, I questioned each defendant, individually and under oath, to ensure that each was aware of the potential conflicts that very likely could arise in this case. In addition to questioning the defendants on matters which had been explored by counsel, I also ascertained that each defendant understood that separate counsel could present a united defense strategy but, unlike joint counsel, could present alternative defenses as well. More importantly, I assured myself that financial considerations played no part in defendants' choice of joint counsel. Defendants advised me that their legal expenses were being paid by their union, the Fraternal Order of Police. Further, I advised each defendant that, if I ordered separate counsel and the union refused to defray the cost of such counsel, I would appoint counsel for them. Finally, in the presence of the court and defense counsel only, each defendant was given the opportunity to explain in his own words why, in light of the several risks created by joint representation, he wished to be represented jointly with the other defendants.

At the conclusion of the hearing, I found that (1) a conflict of interest was very likely to arise in the course of the proceedings against defendants; (2) each defendant was fully and completely aware of the potential conflicts; and (3) each defendant, without financial pressure, had voluntarily and intelligently chosen to waive any claim of conflict of interest and elected to be represented by one counsel. Defense counsel and the Government were then instructed to brief the question of whether I must accept the defendants' waiver, notwithstanding the conflict of interest that I find is very likely to arise. In addition, I asked the parties to address the question of whether I must disqualify the firm of Sprague and Rubenstone from the case entirely, in the

event that I order that each defendant be separately represented.

Both sides have now filed memoranda of law. Since defense counsel concedes that "logic mandates" that the firm of Sprague and Rubenstone must be disqualified should separate counsel be ordered, the sole question before me is whether I may, and should, reject the defendants' voluntary, knowing and intelligent waiver of their right to separate counsel, given the conflict which is very likely to arise.

To find that a conflict is likely to arise in this case, one need not look beyond the indictment and the numerous pretrial motions, together with supporting memoranda of law, filed by defense counsel. It is immediately apparent from reading the indictment that all four defendants are not charged in each count, reflecting the fact that each defendant's involvement may vary significantly from that of the others. Indeed, the basis of defendants' motion to dismiss Count One of the indictment focuses almost entirely on the differences in each defendant's role in the allegedly false arrests:

> The indictment, then, charges that since arrests occurring on five days within the 17 month period (September 27, 1979; December 18, 1979; May 19, 1980; November 3, 1980; and January 6, 1981) were made without probable cause, therefore *each* of the movants necessarily conspired with each other to "arrest various citizens without probable cause" [Indictment, Count One, Paragraph 2] throughout the length and breadth of the 17 month period. In addition, only two movants, Flanagan and McNamee, participated in each of the five arrests. As is reflected in the "Indictment Breakdown", Landis was not involved in the arrest or other proceedings involving Walker and Howard, so that the indictment contains no hint that Landis could have been part of the conspiracy alleged, at least until the

> arrests of Woodrit and Young, on December 18, 1979.
>
> Similarly, movant Keweshan is not alleged to have acted in any capacity, or even been present at, the arrests of Ford and Tooles on May 19, 1980. Indeed, the only arrests in which each movant is alleged to have participated, are those of Woodrit and Young, Adams, and Bibbs.

Defendants' Memorandum of Law in Support of Motion to Dismiss Count One of the Indictment (Document 12, at p. 3).

> And again.
>
> Indeed, the different identity of the alleged co-conspirators present during each "illegal" arrest, coupled with the disparate times within which the conspiracy is alleged to have existed, and the fact that, despite performing the same activity throughout the totality of the period ostensibly covered by the conspiracy, on no other dates with no other arrests are such acts deemed to be "illegal", suggests not only that each "illegal arrest" was the product of a separate and distinct agreement, but also that each movant, on the other dates within the period while working as a police officer, necessarily "withdrew" from any agreement to violate any law.

Id. at 13. The likelihood that one or more defendants might, at some point, wish to distinguish his or their particular role from the others is hardly remote. Furthermore, defense counsel has observed correctly that this is a complex case which will most likely turn on circumstantial evidence which is "subject to various interpretations and fine distinctions." Defendants' Memorandum of Law in Support of Defendants' Motion for Disocvery and Inspection (Document 10) at p. 3. Implicit within this complexity is the fact that essential to the Government's case is proof of each defendant's state of mind. The defendants expressly recognize that oral statements

made by the defendants are essential to prove the requisite state of mind of each defendant. *Id.* at 3-4. The potential for conflict here is overwhelming since joint counsel's obligation to preserve the confidences of one defendant could severely hamper the cross-examination of any hearsay witness as to another defendant. Since a defendant's "guilt or innocence may turn on exactly what was said," *id.* at 4, I cannot lightly overlook this possibility of conflict.

The most glaring evidence of the potential for conflict which may arise if all defendants are represented jointly is found in defendants Keweshan, Landis and McNamee's motion for severance, and the accompanying memorandum of law (Document 13). Although paragraphs 2-5 of the motion are set forth in the footnote,[2] briefly stated, defense counsel contends in the

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2. In pertinent part, defendants Keweshan, Landis and McNamee's motion for severance states:

(2) Defendants Keweshan, Landis and McNamee, in the performance of this duty would remain hidden while co-Defendant Robert Flanagan, posing as an aged derelict, was confronted and robbed of his money by numerous individuals. Only after the criminals had taken his money and co-Defendant Robert Flanagan gave a standard alarm, "Give me back my money," did the backup officer come on the scene.

(3) Defendants Keweshan, Landis, and McNamee aver that the present Indictment, stripped to the core, discloses that all alleged violations of 18 U.S.C. 241, 242 and 2 are by necessity based upon one of several arrests in which certain of them, in the performance of their duty, and only in response to their team leaders signal, acted to take a suspect into custody, reported their knowledge of this act to their superiors, and, in response to Subpoenas, gave testimony as to their participation in these arrests in various courts of law.

(4) Defendants Keweshan, Landis, and McNamee aver that (a) since their participation in each arrest underlying this Indictment was predicated on their receipt of a prearranged signal from co-Defendant Flanagan; (b) further, that from their places of hiding, they were not privileged to the details of what, in fact, occurred between co-Defendant Flanagan and the various persons who robbed him; and (c) each of the overt acts and

motion for severance their defendants Keweshan, Landis and McNamee will be severely prejudiced if forced to stand trial with defendant Flanagan because it was Flanagan's information which provided the probable cause for each arrest. Specifically, counsel contends that prejudice will arise because the vast majority of the Government's evidence will be adduced against Flanagan. Hence, defense counsel argues in the memorandum of law in support of the motion for severance: "The circumstances underlying the present Indictment are such that Defendants Keweshan, Landis and McNamee strongly urge upon this Court that 'the moment' when prejudice is likely to occur if they are forced to trial along with co-Defendant Flanagan is now." Defendants' Memorandum of Law in Support of Defendants' Keweshan, Landis and McNamee's Motion for Severance (Document 13) at p. 2. Because I too am gravely concerned by the prejudice which might redound to the other defendants by virtue of their association with Flanagan and, more particularly, by joint counsel's possible inability to distance Keweshan, Landis and McNamee from Flanagan, I must address the question of whether I may order separate counsel over defendants' voluntary, knowing and intelligent waiver of their right to separate counsel.

Fed.R.Crim.P. 44(c) provides that, "[u]nless it appears that there is good cause to believe no conflict is *likely to arise*, the court shall take such measures as may be appropriate to protect each defendant's right to

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acts included in substantive counts, related to certain of them in their individual capacity, is, standing alone, a legal act, and, in fact, was required either by circumstance or law.

(5) Defendants Keweshan, Landis and McNamee aver that in consideration of all the foregoing reasons, the Government's case, by necessity, will be dependent on facts and circumstances of which they have little or no knowledge, but, rather, the vast majority of the Government's evidence will be related to what transpired between co-Defendant Flanagan and the various individuals who robbed him.

counsel." Fed.R.Crim.P. 44(c) (emphasis added). The phrase "such measures as may be appropriate to protect each defendant's right to counsel" is nowhere defined in the rule. Furthermore, since the rule did not become effective until December 1, 1980, there is no case law, as yet, interpreting the rule. Nevertheless, defendants argue that, based on pre-rule 44(c) precedents in this and other circuit courts of appeals, this court has no power to reject a criminal defendant's voluntary, knowing and intelligent waiver of separate counsel unless an *actual* conflict of interest is shown to exist. The Government argues to the contrary, contending that, pursuant to my obligation to supervise the conduct of members of the bar, I do have authority to reject the defendants' waiver and order that each be represented by separate counsel.

As with so many difficult legal questions, resolution of the issue before me requires a balancing of two substantial but competing interests. First, while it is often said that a criminal defendant does not have an absolute Sixth Amendment right to particular counsel, *United States ex rel. Carey v. Rundle*, 409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970), that statement should not be construed to mean that a defendant has no constitutional right to counsel of his choice. The Third Circuit Court of Appeals has frequently stated that, within limits, a criminal defendant is entitled to be represented by particular counsel. *E.g., Davis v. Stamler*, 650 F.2d 477 (3d Cir. 1981); *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979); *United States ex rel. Carey v. Rundle, supra*. However, against a defendant's Sixth Amendment right to counsel of his choice must be weighed this court's responsibility to supervise the professional conduct of attorneys practicing before it. *See, e.g., United States v. Miller*, 624 F.2d 1198 (3d Cir. 1980). In *Miller*, the district court disqualified the law firm representing Miller because a member of the law firm had been an assistant U.S. Attorney at the time the case against *Miller* was prepared. Even though the for-

mer government attorney had no direct involvement with the preparation of the case against Miller, the Court of Appeals upheld the district court's order disqualifying the attorney in order to avoid the appearance of impropriety which might result if former prosecutors were permitted to "assume private employment that appears to involve conflicts of interests." *Id.* at 1202-03. Similarly, in *United States v. Provenzano*, 620 f.2d 985 (3d Cir.), *cert. denied*, 101 S.Ct. 267 (1980), the district court disqualified a defendant's attorney because the attorney had previously represented the government's chief witness, Ralph Picardo, on a murder conviction. Although the defendant was willing to waive the conflict, the Court of Appeals upheld the district court's order because the attorney's duty to preserve the confidences of Picardo could interfere with the effectiveness of the attorney's cross-examination of Picardo on behalf of his client. Interestingly, the Court of Appeals accepted the district court's assumption (since no explicit findings were made) that the attorney possessed privileged information which involved him in a conflict. *See id.* at 1004-05.

Although the ethical considerations which justified disqualifying the criminal defendant's attorney in *Miller* and *Provenzano* did not stem from any multiple representation of defendants, the two decisions reflect clearly the Third Circuit Court of Appeals' heightened sensitivity toward ethical concerns and the district court's responsibility for enforcing the rules of ethics. This sensitivity is further reflected in *United States v. Quinones*, 613 F.2d 47 (3d Cir.), *cert. denied*, 446 U.S. 937 (1980), which, unlike *Miller* and *Provenzano*, did involve multiple representation of defendants. In *Quinones*, the district court found that a potential for conflict of interest existed and that the defendants had not made a knowing and intelligent waiver of their right to effective representation. The district court ruled, however, that the defendants could not be represented by the same counsel, and

the Court of Appeals affirmed the ruling as not clearly erroneous. On only one occasion has the Court of Appeals for the Third Circuit reversed a district court for disqualifying counsel of a criminal defendant's choice, *see United States v. Laura, supra,* and then only because the district court failed to give any reasons on the record for so doing.

Defendants argue that *Miller, Provenzano* and *Quinones* are all inapposite to the issue presented by the Government's motion to prohibit multiple representation. Rather, defendants maintain that the Third Circuit Court of Appeals' decision in *United States v. Dolan,* 570 F.2d 1177 (3d Cir. 1978), is controlling. In *Dolan,* two defendants, Michael Garofolo and John Dolan, were represented jointly by Samuel DeLuca. The day before the trial was scheduled to begin, DeLuca, without Garofolo's knowledge, offered to have Garofolo plead guilty if the Government would agree to dismiss the charges against Dolan. Although the Government refused, Garofolo pled guilty on the date set for trial. After questioning Dolan and Garofolo about the dangers of multiple representation, the district court judge accepted Garofolo's guilty plea. With sentencing of Garofolo postponed, the trial against Dolan then went forward. Dolan took the stand in his defense and attempted to shift the guilt to Garofolo. Subsequently, the Government informed the court that Garofolo had been subpoenaed to testify as a rebuttal witness. At this juncture, the judge questioned DeLuca as to how he could represent Garofolo, who was awaiting sentencing, and effectively cross-examine Garofolo on behalf of Dolan. Although DeLuca stated that he perceived no conflict of interest, the district court ordered DeLuca to withdraw from representing either Garofolo or Dolan. On appeal; Dolan's attorney argued that Dolan had the right to waive his right to the effective assistance of counsel and to proceed with DeLuca as his attorney in spite of the conflict of interest. The Court of Appeals found that the district court had properly ex-

ercised its supervisory authority in disqualifying DeLuca and affirmed, stating:

> Faced with an actual serious conflict of interest, rather than a mere possibility, in which it is obvious that Mr. DeLuca cannot "adequately represent the interest" of his client, Dolan, must the court accede to Dolan's waiver of conflict of interest? We think not. In the current effort to elevate the standards of the organized bar, the ABA Code of Professional Responsibility provides that "a lawyer may represent multiple clients [only] if it is obvious that he can adequately represent the interest of each. . . ." ABA Code of Professional Responsibility (1975) DR5-105(C). Accordingly, we hold that when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation. See Note, *Conflict of Interests in Multiple Representation of Criminal Defendants*, 68 Crim.L.&C. 226, 250 (1977).

570 F.2d at 1184 (notes omitted).

Defendants read *Dolan* as holding that only where an *actual* conflict of interest is found may a district court

disregard a defendant's knowing and intelligent waiver of his right to effective representation. Thus, since no actual conflict of interest has been shown to exist in this case thus far, defendants contend that their Sixth Amendment right to counsel of their own choosing must be respected. Defendants' position appears to be in accord with decisions from the Second and Fifth Circuit Courts of Appeals which indicate that a criminal defendant may knowingly and intelligently waive his right to conflict-free representation, and that the district court's supervisory authority must give way to the defendant's Sixth Amendment right to particular counsel. *See United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

Unlike defendants, I do not read *Dolan* as holding that *potential* conflict is *never* sufficient to override a defendant's knowing and intelligent waiver of his right to effective representation. Indeed, that issue was not before the court. In *Dolan*, the conflict manifested itself *after* the trial had commenced. Here, I must determine whether a district court may take the initiative and exercise its discretion to avoid the serious potential for conflict before jeopardy attaches. Since I conclude that I may, and, more importantly, because of my grave concern that a conflict is very likely to arise in this case, I will grant the Government's motion and disqualify the firm of Sprague and Rubenstone from representing any of the defendants in this case.

In reaching my determination, I am influenced by several factors. First, Rule 44(c), which became effective more than two years after *Dolan* was decided, looks prospectively. Obviously, in advance of trial, the district court judge has very little opportunity to discern whether an actual conflict of interest exists as a result of multiple representation. To overcome this difficulty, some courts have resorted to what to me appears to be the fiction of finding that the attempted waiver is not

knowingly and intelligently made. I simply refuse to adopt that approach where, after a thorough examination of defendants, four career police officers continue to desire to be represented by single counsel. Second, the concerns underlying the *Dolan* decision appear to be as pressing in this case. In *Dolan*, the Court of Appeals expressed concern not only over the breach of professional ethics arising from the joint representation, but also over the interest of the trial judge in being "free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court." 570 F.2d at 1184.

Although not easily applied, defense counsel's ethical responsibility to the defendants in this case is contained in *ABA Standards Relating to the Defense Function* §3.5 (Approved Draft 1971) which, in relevant part, provides:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is *clear that no conflict is likely to develop* and when the several defendants give an informed consent to such multiple representation.
> (Emphasis supplied)

See also ABA Code of Professional Responsibility DR5-105. Based upon defense counsel's submissions to the court, I have no doubt that this is not a case where "no conflict is likely to develop." Indeed, I am not sure defense counsel is even in a position to discuss the possibilities of conflict with the defendants:

> A summary reading of the Indictment will convince the Court that not only are the Defendants unable to determine what particulars the Government intends to prove against them as a group, but perhaps more importantly, the Defendants as indi-

> viduals are unable to make a reasoned determination whether there is a defense available to one individual which might prove adverse to the others. Absent the ability to make such a determination, the Defendants, if forced to trial absent a Bill of Particulars, will be denied their right to a fair trial guaranteed by the Sixth Amendment of the United States Constitution, and the effective assistance of council (*sic*) guaranteed by the Fifth Amendment of the United States Constitution.

Defendants' Memorandum of Law in Support of Motion for Bill of Particulars (Document No. 7) at p. 4.

Finally, merely because I find the defendants' waiver of their right to effective representation to be knowing and intelligent today in no way guarantees the continuing validity of that waiver throughout the remainder of the proceedings against them. Under such circumstances, must I sit back and wait for a potential conflict to become an actuality? If my finding that there is a potential for conflict were based upon mere speculation, I too would agree that the court should not interfere with a defendant's choice of counsel. But, where the likelihood is great that a potential conflict may escalate into an actual conflict, and thus threaten to render the entire trial process null and void, I believe it is well within a court's discretion to anticipate the conflict and disqualify defense counsel.

In support of their argument that an actual conflict of interest is necessary before a valid waiver can be rejected, defendants cite the Supreme Court's recent decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which held to establish a violation of his Sixth Amendment right to the effective assistance of counsel, a criminal defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348. *Cuyler* dealt with issues substantially different from those presented in this case. *Cuyler* went to the

Supreme Court on *certiorari* from a ruling of the Court of Appeals for the Third Circuit directing the district court to grant a state prisoner's petition for a writ of habeas corpus. Applying the standard enunciated in *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3d Cir. 1973), the Court of Appeals had held that Sullivan had been deprived of his Sixth Amendment right to the effective assistance of counsel because a possible conflict resulted from the joint representation of Sullivan and a co-defendant during their separate trials in state court. The Supreme Court reversed, holding that possible conflict was insufficient to constitute a violation of Sullivan's constitutional rights.

I am not persuaded that *Cuyler* requires a showing of an actual conflict of interest before defense counsel may be disqualified over defendants' knowing and intelligent waiver. In *Cuyler*, the trial (in the state court) had taken place. It was an accomplished fact. What happened at the trial with joint counsel was history. To require a showing of actual conflict of interest to establish a violation of a defendant's constitutional rights in a completed trial provides no authority compelling a court to wait until an actual conflict arises before it may act to forestall a violation of those same rights. *Cuyler* did not involve disqualification of counsel on ethical grounds. *Cuyler* did not involve application of F.R.Crim.P. 44(c). As noted earlier in this opinion, Rule 44(c) is prospective in its thrust. Clearly the intent of the rule would be frustrated if a court were forced to await a constitutional violation before it could act to prevent it. Thus, while I recognize that the defendants have a right to counsel of their choice, that right is not unlimited and must yield to the court's overriding interest in protecting their rights to adequate representation and fair trial, and in preserving the integrity of its procedures.

Accordingly, for the reasons expressed in this opinion, I will grant the Government's motion to prohibit multiple representation and disqualify the firm of

Sprague and Rubenstone from representing any of the four defendants.[3]

_____

J.

3. My decision to disqualify defense counsel is based upon the conflict of interest which I find is likely to result from the multiple representation of the four defendants. The Government, in its Supplemental Memorandum in Support of Its Motion for Disqualification, has attempted to interject a new conflict. Specifically, the Government states that Sprague and Rubenstone also represented Officer James Kennedy during the grand jury investigation of the defendants and that Kennedy is a possible government or defense witness in the pending case. If this were the only ground for disqualification I would not be inclined to give it much weight, for to do so would permit the Government to create a potential conflict where none might otherwise have been likely to arise. Under the circumstances, however, where I have been persuaded that other grounds for disqualification are sufficient this added fact demonstrates the danger inherent in an attorney's attempt to represent multiple persons charged with unlawful activity.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS MCNAMEE

Criminal No. 81-270

ORDER

This 2nd day of December, 1981, it is

ORDERED that the Government's Motion to Prohibit Multiple Representation of Defendants is GRANTED and the firm of Sprague and Rubenstone is disqualified from representing any of the defendants in the above captioned action. It is

FURTHER ORDERED that each defendant shall within twenty (20) days cause substitute counsel of his choice to enter an appearance on his behalf, failing which the Court shall appoint counsel for each from attorneys registered under this Court's plan for appointment of attorneys under the Criminal Justice Act.

The Court having been advised of defendants' intention to file an immediate appeal from this Order, it is

FURTHER ORDERED that a Stay is GRANTED pending disposition of the appeal.

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J.

Appellant's Reply Brief

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No. 81-476

In the Supreme Court of the United States

October Term, 1981

WALTER W. COHEN, CONSUMER ADVOCATE OF PENNSYLVANIA et al.,
Appellants

v.

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA et al.,
Appellees

On Appeal From the Supreme Court of Pennsylvania

BRIEF IN RESPONSE TO MOTION TO DISMISS

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I. INTRODUCTION

This brief is submitted by appellants, Walter W. Cohen, Consumer Advocate of Pennsylvania *et al.*, in reply to the motion to dismiss filed by appellees, the Disciplinary Board of the Supreme Court of Pennsylvania, *et al.*, in accordance with U.S. Supreme Court Rule 16.5, 28 U.S.C.

II. APPELLEES' ASSERTION OF COMITY AS A REASON FOR REFUSING TO CONSIDER THIS APPEAL SHOULD BE REJECTED

In their attempt to discourage this Court's review of the Pennsylvania Supreme Court's final judgment upholding the federal constitutionality of Pennsylvania Disciplinary Rule 7-107(H), appellees assert that "[b]road principles of comity provide justification for dismissal of this appeal." Motion to Dismiss at 5. Appellees claim that the comity doctrine, enunciated by this Court in *Younger v. Harris,* 401 U.S. 37 (1971), is applicable to the instant case because of a "deliberative process" allegedly underway under the auspices of state bar associations and the American Bar Association.* This deliberation allegedly involves consideration of a final draft of the "Model Rules of Professional Conduct" proposed by the ABA's "Kutak

* Appellees allege that a "nationwide deliberative process" surrounds the ABA's Kutak Commission's proposed final draft of the "Model Rules of Professional Conduct." The existence and scope of this process is allegedly demonstrated in Pennsylvania by quotation from a newspaper article that appeared in Philadelphia's "Legal Intelligencer," Vol. 185, No. 73, describing the Philadelphia Bar Association's activities with regard to the Kutak Commission's proposals. Motion to Dismiss at 6-7 "The appellee *surmises* that evaluations of this nature are being carried out by the judges and lawyers of the 50 states and *perhaps* the federal circuit courts." Id. at 7. (Emphasis added.)

Commission." *(Model Rules of Professional Conduct, Proposed Final Draft,* ABA Commission on Evaluation of Professional Standards, May 30, 1981). Motion to Dismiss at 5-8. Appellees' assertion of the "comity" doctrine in these circumstances in order to dissuade this Court from considering the substantial constitutional questions here presented sets the doctrine on its head.

The doctrine of comity or abstention between federal and state courts was developed to ensure that state courts would have the opportunity to adjudicate local issues brought before them without undue and untimely interference by the federal courts. *See, Huffman v. Pursue, Ltd.,* 420 U.S. 592, 601 (1975). In this case, the state court system has had a full and complete opportunity to review the propriety of one of its attorney disciplinary rules. Appellants originally brought their case before the Commonwealth Court of Pennsylvania. When that state court rejected appellants' argument that Disciplinary Rule 7-107 (H) violated their federally guaranteed first and fourteenth amendment rights, appellants properly appealed the decision to the Supreme Court of Pennsylvania. When that court rejected appellants' constitutional arguments in a *per curiam* decision, without discussion of the merits, appellants sought the only recourse available to preserve their rights under the Constitution of the United States. That is, appellants filed an appeal as of right to the United States Supreme Court pursuant to 28 U.S.C. §1257 (2).

Nonetheless, appellees propose that this Court should refrain from reviewing the Pennsylvania Supreme Court's final judgment in light of the abstention doctrine enunciated in *Younger v. Harris,* 401 U.S. 37 (1971).* The

* A corollary abstention doctrine, not cited by appellees, has developed from this Court's decision in *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1941). The *Pullman* doctrine, however, applies to abstention by federal courts where there are

principle of comity developed in *Younger v. Harris* and its progeny does not apply to a case such as the one at bar, where the state court system has completed its review and adjudication. This has been made clear by this Court's decision in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). There, the comity guidelines first enunciated in *Younger v. Harris* with regard to pending state *criminal* proceedings were extended to some state civil proceedings, in limited circumstances and where state remedies have not been exhausted. Thus, the *Huffman* Court rejected federal intervention in state cases which had not yet been appealed to the proper state appellate courts. The Court specifically stated, however, that U.S. Supreme Court review would be proper once such cases had exhausted their avenues in the state appellate system:

> A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. *Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right. 28 U.S.C. §1257(2).* Thus, appellee in this case was assured of eventual consideration of its claim by this Court.

420 U.S. at 605 (emphasis supplied). This is precisely the factual situation presented by this appeal.

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ambiguous or unsettled questions of *state* law and construction by the state could avoid the need to reach a federal constitutional question. *See, Garden State Bar Ass'n v. Middlesex County Ethics Committee*, 643 F.2d 119, rehearing den., 651 F.2d 154 (3rd Cir. 1981), *cert. granted*, 50 U.S.L.W. 331 (1981), where the Third Circuit Court of Appeals held that "[t]he disciplinary rules are not susceptible to a construction that would obviate consideration of the constitutional objections to their facial overbreadth." *Id.* Thus, this doctrine would not apply here.

Furthermore, the Court in *Huffman* stated as follows:

> Even assuming, *arguendo*, that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings. . . .
>
> The issue of whether federal courts should be able to interfere with ongoing state proceedings is quite distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state-court dispositions of federal questions. *Younger* turned on considerations of comity and federalism peculiar to the fact that state proceedings were pending. . . .

420 U.S. at 606 (emphasis in original).

Moreover, the second requirement of the *Younger* abstention doctrine, that a relevant state "proceeding" must be in progress, is not met in this case. Appellees contend that "highly competent professional committees of judges and lawyers of distinction and experience" (Motion to Dismiss at 5) are reviewing newly proposed attorney disciplinary rules and that this "review" should be considered a pending state judicial proceeding which should prevent this Court's review of the Pennsylvania Supreme Court's final judgment of the constitutionality of DR 7-107(H). This assertion is incorrect. "*Younger* and subsequent cases such as *Steffel* [*v. Thompson*, 415 U.S. 452 (1974)] have used the term 'pending proceeding' to distinguish state proceedings which have already commenced from those which are merely incipient or threatened." *Huffman v. Pursue, Ltd.*, 420 U.S. at 607. As the Third Circuit Court of Appeals recently stated, "[t]he *Younger* doctrine of abstention . . . operates to limit the power of the federal courts to enjoin

pending state proceedings when a federal plaintiff's claim of unconstitutionality can be raised and timely decided in the state proceedings. *Younger* abstention is not applicable when, *inter alia*, the state proceedings do not realistically afford plaintiff that opportunity. *Gibson v. Berryhill*, 411 U.S. 564 (1973)." *Garden State Bar Ass'n v. Middlesex County Ethics Committee*, 643 F.2d at 122. The informal review of newly proposed "Model Rules of Professional Conduct" by state and national bar associations has none of the attributes of a formal state "proceeding" sufficient to justify federal abstention. The scope of such a review is undefined and there are no deadlines or time limits in which the review must be completed. Most importantly there is absolutely no assurance that any particular state will take *any action* with regard to the proposed Model Rules. It is in no way certain that a substantive, acceptable change in *Pennsylvania's* disciplinary rule will be made as a result of the "nationwide deliberation" asserted by appellees. Thus, there is no way of knowing when the state courts will again be considering the constitutionality of all of the disciplinary rules, distinct from the Pennsylvania courts' already completed consideration of the instant case.

Finally, appellants submit that courts should not defer consideration of important constitutional questions to even formal proceedings involving state or national bar associations. This consideration is even more compelling here where appellees are requesting that this Court defer, not to formal state bar association or disciplinary board proceedings, but to "informal reviews" by members of such bodies.

Appellees seem to assert that a "fiduciary relationship" between attorneys and courts contributes to making the alleged deliberations with regard to the proposed Model Rules a "pending" state proceeding sufficient to cause this Court to refrain from reviewing the Pennsylvania Supreme

Court's final judgment. *See,* Motion to Dismiss at 8. It is respectfully submitted that an individual's status as an attorney can not be allowed to effectively restrict his right to a review by this Court of a constitutional deprivation after having exhausted all state court avenues just as that status may not curtail that individual's basic constitutional protections to a degree greater than any other person. *See,* Jurisdictional Statement at 19, n. **; *In re Primus,* 436 U.S. 412 (1978); *NAACP v. Button,* 371 U.S. 415 (1963); *Wood v. Georgia,* 370 U.S. 375 (1962); *In re Halkin,* 598 F.2d 176 (D.C. Cir. 1979); *Polk v. State Bar of Texas,* 374 F. Supp. 784 (N.D. Tex. 1974).

For all of the foregoing reasons, appellants respectfully submit that appellees' attempt to re-define and apply comity to the instant factual situation is unfounded in preceedent or in the legitimate policy considerations underlying the evolution of this doctrine.

In the final analysis, appellees are simply requesting that this Court ignore the significant constitutional questions presented by this appeal because the organized bar has begun a process of reevaluating the propriety of disciplinary rules including rules which restrict lawyer comment concerning pending proceedings. Such an evaluation may or may not result in a substantive change in the disciplinary rules applicable to lawyers practicing in the Commonwealth of Pennsylvania, or in any other state for that matter.

Appellees' approach would subject attorneys throughout the country, including the appellants in this case, to improper and chilling restrictions on their first amendment rights for an indeterminate period of time. It is respectfully suggested that this appeal provides this Court with the timely opportunity to consider and clarify the appropriate constitutional parameters of rules which restrict attorney comment concerning pending administrative proceedings.

A deferral of this opportunity will leave lawyers under the present cloud of uncertainty as to the scope of permissible speech; such uncertainty can only continue to result in self-imposed restrictions on expression protected by the first amendment.

III. NEITHER THE PROTECTION OF THE APPEARANCE OF FAIRNESS, NOR THE "INTEGRITY" OF THE COURTS IS AN INTEREST WHICH CAN PROPERLY JUSTIFY THE CHALLENGED DISCIPLINARY RULE'S BROAD RESTRICTION OF ATTORNEYS' FIRST AMENDMENT RIGHTS

In their motion to dismiss, appellees suggest that it is appropriate to restrict attorneys' first amendment rights whenever the appearance of unfairness or the "integrity" of the judicial system is in question. Motion to Dismiss at 12-13.

For this contention to be valid it must be assumed either that protecting the "integrity" of the judicial system is an important governmental interest sufficient to justify restrictions on speech pursuant to the standards enuciated in *Procunier v. Martinez*, 416 U.S. 396 (1974), or that because of their status as members of the bar the first amendment rights of attorneys may be restricted to a degree greater than would be permissible if any other individual or class of individuals were involved. Neither of these assumptions is correct.

When first amendment rights will be abridged, a state may not enact regulations merely to protect the "integrity" of the judicial process or the "appearance" of a fair system in the minds of the public, and this Court has so held in a number of cases. "[N]either the Commonwealth's interest in protecting the reputation of its judges, *nor its interest in*

maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech. . . ." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 841 (1978) (emphasis added). While the state may generally have an interest in protecting the good repute of the judicial system and of promoting the integrity of the tribunal in which an attorney is participating, it may not do so by "repressing speech that would otherwise be free." *New York Times v. Sullivan,* 376 U.S. 254, 272-73 (1964). *See also, Bridges v. California,* 314 U.S. 252, 270-71 (1941); 291-92 (Frankfurter, J., Dissenting); *Craig v. Harney,* 331 U.S. 367, 376 (1976).*

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* In seeking to support its view that a rule protecting only the appearance of impartiality is constitutionally valid, appellees have cited several cases in which the criminal convictions of defendants have been overturned because of undue or unfair trial publicity. *See* Motion to Dismiss at 15-16. However, these cases stand only for the proposition that a defendant's conviction may require reversal when a proceeding is in fact unfair or when an appearance of unfairness has been created. However, this fact provides no justification for broad prophylactic rules which restrict the free speech rights of individuals. *See,* Jurisdictional Statement at 20-21.

For the same reason, appellees' reference to the opinion in *United States v. Flanagan,* Crim. No. 81-270 (E.D. Pa., Dec. 2, 1981) (Motion to Dismiss at A-19), provides no support for the constitutionality of DR 7-107. That decision was not aimed at protecting a defendant's fair trial rights in the face of the free speech rights of other individuals. The legitimate, substantial interest protected by Judge Luongo's restriction of the four *Flanagan* defendants' right to *choice* of counsel was their right to "adequate representation and fair trial." Judge Luongo exercised the court's statutory authority to "*protect* each defendant's *right to counsel,*" Fed. R. Crim. P. 44(c), by prohibiting multiple representation in that particular case. The pertinent ABA Standard and Disciplinary Rule (*ABA Standards Relating to the Defense Funtion* §3.5 (Approved Draft, 1971) and ABA Code of

Nor can the Rule at issue be constitutionally justified because it only applies to attorneys. This Court has made clear that an attorney's constitutional rights are co-extensive with those of any other individual or class of individuals. *See* Appellants' Jurisdictional Statement at 19, n. **. *See, also, Polk v. State Bar of Texas,* 374 F. Supp. 784 (N.D. Tx. 1974); *Spevak v. Klein,* 385 U.S. 511 (1967); *Garrity v. New Jersey,* 385 U.S. 293 (1967).

Special restrictions on lawyers' first amendment rights also may not be justified simply because such restrictions are limited to the duration of a trial. The right to communicate information at a particular time in many instances is just as important as the right to communicate at all. Commentary on a particular case may be of little interest after the case has concluded. *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 258 (7th Cir. 1975), *cert. den.,* 427 U.S. 912 (1976). Moreover, civil and administrative proceedings are often of long duration and a restriction for the pendency of such a case may mean that the public's interest in such information will no longer exist when comment finally is permitted. *Id.* For this reason,

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Professional Responsibility DR 5-105)) and Judge Luongo's order restricted not a fundamental constitutional right of the attorney but rather the attorney's right to represent particular defendants when the defendants' right to adequate representation absent conflict of interest, and thus a fair trial itself, was at stake.

Further, the opinion restricted defendants' right to be represented by counsel of their choice only after determining that such action was absolutely necessary and constituted the least drastic alternative available in order to preserve the fair trial rights of the defendants. In this instance the government had a legitimate interest in ensuring against the potential of a conflict of interest which would prejudice the defendants' fair trial rights. In contrast, the state has no legitimate interest in protecting against the appearance of partiality of a proceeding when first amendment rights will be restricted.

the restriction goes beyond merely a restriction on the timing of the speech and impermissibly affects the *content*. *Bridges v. California*, 314 U.S. 252, 269-271, and n. 14 (1941); *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979). *Cf. Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 96, 99 (1972). The unconstitutional restrictions contained in DR 7-107 cannot be justified on the basis of the fact that it is directed against attorneys participating in pending proceedings.

IV. CONCLUSION

Appellants respectfully submit that, based on the foregoing and on the arguments set forth in appellants' Jurisdictional Statement, this appeal presents a substantial question involving the first and fourteenth amendments of the United States Constitution which merits plenary review. Therefore, appellants respectfully urge Your Honorable Court to note its jurisdiction in this appeal, receive full briefs on the merits and hear oral argument.

Respectfully submitted,

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